93-675
NO.

FILED
OCT 27 1993
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1993

CYNTHIA KELLEY, INDIVIDUALLY
AND ON BEHALF OF HER MINOR CHILDREN
JERRED SETH KELLEY AND
CINDY LYNN KELLEY
PETITIONERS

versus

INDUSTRIAL REFRIGERATED SYSTEMS, INC.,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HENRY L. KLEIN, ESQ.
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

Attorney for
Petitioners-Applicants

OF COUNSEL:
HEISLER & WYSOCKI

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED FOR REVIEW

QUESTION NUMBER 1

IS THE FIFTH CIRCUIT'S AFFIRMING OF SUMMARY JUDGMENT IN THIS PRODUCTS LIABILITY CASE (a) EMBLEMATIC OF THE CONFUSION THAT HAS ARISEN IN THE APPLICATION OF THE *CATRETT-ANDERSON-MATSUSHITA* TRILOGY, OR (b) A CLEAR DEPARTURE FROM ACCEPTED STANDARDS REGARDING SUMMARY JUDGMENTS?

QUESTION NUMBER 2

DID THE FIFTH CIRCUIT MISAPPLY LOUISIANA PRODUCTS LIABILITY LAW IN THIS DIVERSITY CASE BY SUMMARILY RULING ON AN "OPEN AND OBVIOUS DANGER" DEFENSE WHICH IS NO LONGER RECOGNIZED IN LOUISIANA OR IN THE VAST MAJORITY OF OTHER JURISDICTIONS?

QUESTION NUMBER 3

IS THE FIFTH CIRCUIT DECISION IN THE CASE AT BAR INCONSISTENT WITH PRIOR DECISIONS OF NOT ONLY THE FIFTH, BUT OTHER CIRCUITS, WHICH HAVE ESTABLISHED A RULE AGAINST (a) GRANTING SUMMARY JUDGMENT IN PRODUCTS LIABILITY CASES AND (b) GRANTING SUMMARY JUDGMENT WHERE THE ISSUE OF "STATE OF MIND" IS A KEY ELEMENT OF THE DEFENSE ALLEGED?

QUESTIONS PRESENTED FOR REVIEW (continued)

QUESTION NUMBER 4

DID THE FIFTH CIRCUIT PROPERLY GRANT SUMMARY JUDGMENT ON GROUNDS NOT RAISED BY THE MOVER'S MOTION?

QUESTION NUMBER 5

IS THE LETHALITY OF SCREW-TYPE AUGERS A MATTER OF NATIONAL CONCERN SO AS TO WARRANT CONSIDERATION OF THIS CASE BY THE SUPREME COURT?

TABLE OF CONTENTS

PAGE(S)

Questions Presented for Review i

Table of Contents iii

Table of Authorities iv

Opinions Delivered in the Case by Other Courts 1

Statement of Jurisdiction 1

Statutes Applicable to this Court 1

Statement of the Case 2

A. Course of Proceedings and Disposition in Courts Below 2

B. Statement of Facts 4

Argument 10

Conclusion 28

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Statutes

Title 28 U.S.C. §1254(1) 1

Title 28 U.S.C. §1291 3

10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2729 22

Rule 56(c), Federal Rules of Civil Procedure: Motions and Proceedings Thereon 2

Local Rule 2.09 Motions for Summary Judgment 1,3,24,25

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) . . . . . *passim*

Bell v. Jet Wheel Blast, 462 So.2d 166 (La.1985) 2,18

Camacho v. Honda Motor Co., 741 P.2d 1240 (Colo.1987), *cert. dismissed*, 485 U.S. 901 (1988) 18

Campo v. Scofield, 95 N.E.2d 802 (N.Y. 1950) 17

TABLE OF AUTHORITIES (continued)

CASES **PAGE(S)**

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 7,11,12,14,24

Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991) 11,12

Crowley v. Matson Navigation, 434 F.2d 72 (5th Cir. 1970) 23

Daughenbaugh v. Bethlehem Steel, 891 F.2d 1199, at 1205 (8th Cir. 1989) 22

Davidson v. Stanadyne, Inc., 718 F.2d 1334 (5th Cir. 1983) 21

Easton v. Chevron, 602 So.2d 1032 (4th Cir.1992) 24

Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 11

Flemming v. Florida Citrus Exchange, 79 S.Ct. 160, 358 U.S. 153, 3 L.Ed. 2d 188 (1958) 10

Glus v. Brooklyn Eastern Dist. Terminal, N.Y. 79 S.Ct. 760, 359 U.S. 231, 3 L.Ed.2d 770 (1959) 7

Gray v. Manitowoc Co., 771 F.2d 866 (5th Cir. 1985) . . . 8

Hanna v. Plumer, 380 U.S. 460 (1965) 11

TABLE OF AUTHORITIES (continued)

CASES **PAGE(S)**

Hopper v. Crown, 555 So. 2d 46 (La. Ct. App. 1989), *reversed*, 558 So. 2d 1117 (La.S.Ct. 1990) 15,16

Hopper v. Crown, 560 So. 2d 890 (La. Ct. App. 1990) 19

Hughes v. America Jawa, Inc.. 529 F.2d 21 (8th Cir. 1976) 22

Kelley v. Price-Macemon, Inc., 992 F.2d 1408, 1416 (La. 5th Cir. 1993) 12,14,15,18,20,21

Lavespere v. Niagara Machine & Tools Works, 910 F.2d 167 (5th Cir.1990) 22

Little v. Liquid Air Corp., 952 F.2d 841 (5th Cir. 1992) 12,22,

Martin v. Henderson, 505 So. 2d 192 (La. Ct. App. 1987) 17

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 7,11,16

Melton v. Deere & Co., 887 F.2d 1241 (5th Cir. 1989) . . 8

Micallef v. Miehle Co., 348 N.E.2d 571 (N.Y. (1976) . . . 18

TABLE OF AUTHORITIES (continued)

CASES **PAGE(S)**

Miller-Schmidt v. Gastech, Inc., 864 F.2d 1181 (5th Cir. 1989) 22

Nelton v. Astro-Lounger Mfg. Co., 542 So. 2d 128 (La. Ct. App. 1989) 17

Oster v. Department of Transp. & Dev., 582 So. 2d 1285, 1289 (La. 1991) 8,17,19

Poller v. CBS, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed. 2d 485 (1962) 22

Putman v. Gulf States Utils., 588 So. 2d 1223, 1229 (La. Ct. App. 1991) 8,14,17,18

Rogers v. Peabody, 342 F.2d 749 (6th Cir. 1965) 22

Russ v. International Paper Co., 943 F.2d 589 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1675 (1992) 11

Satcher v. Honda Motor Co., 993 F.2d 56 (5th Cir. 1993) 8,19

Sperry-New Holland, Div. of Sperry Corp. v. Prestage, 617 So. 2d 248 (Miss. 1993) 8

TABLE OF AUTHORITIES (continued)

CASES **PAGE(S)**

Tillman v. Johnson, 612 So. 2d 70 (La. 1993) 16

Trevino v. Yamaha Motor Corp. U.S.A. 718 F.2d 1334 (5th Cir. 1983) 22

Trotter v. Anderson, 417 F.2d 1191 (7th Cir. 1969) . . . 22

Union Supply Co. v. Pust, 583 P.2d 276 (Colo. 1978) (en banc) 17,19

Other Legal Authorities

"Accident Facts" 1981 Edition, *National Safety Council* 10

American Law of Products Liability, 3d § 1:70, at 76 (Timothy E. Travers Managing Ed, 1987) 23

A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgments, Directed Verdicts and the Adjudication Process, 49 Ohio State Law Journal 95 (1988) 7

Chin, James V., *The Eleventh Circuit Clarifies the Initial Burden in a Motion for Summary Judgment*, 26 Ga.L.Rev. 1009, 1018-19 (1992) 11,12

OTHER LEGAL AUTHORITIES (continued)

PAGE(S)

Kruk, Theresa Ludwig, Annotation, *Products Liability: Modern Status of Rule that There is No Liability for Patent or Obvious Dangers,* 35 A.L.R.4th 861 (1987 & Supp.1983) 17

Sevart, J.B., P.E., *Application of Interlocks, Deadman Controls and Emergency Stop Devices as a Design Strategy to Reduce Risk Associated with Agricultural Machinery,* 1982 Presentation at the 1982 Mid-Central Meeting of American Society of Agricultural Engineers 9-10

Sevart, J.B., P.E., *Reducing Risk of Bottom Unloaders by Control Design Systems,* 1985 Presentation to the Mid-Central Meeting of the American Society of Agricultural Engineers 5,10

Summary Judgment in Federal Practice: Super Motion v. Classic Model of Epistemic Coherence, 94 Dick.L.Rev.25, 26 (1989) 11

Twerski, Aaron D., *From Risk-Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation,* 11 Hofstra L. Rev. 861, 933 (1983) 17-18

Viscusi, W.K., *Wading Through the Muddle of Risk-Utility Analysis,* 39 Am.U.L. Rev. 573, 580-84, 601-605 (1990) 18

OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

The opinion of this case is reported at 992 F.2d 1408 (5th Cir.1993). There are no other opinions reported.

STATEMENT OF JURISDICTION

Petitioner[1] seeks review by way of a Petition for Writ of Certiorari to a decision rendered by the United States Court of Appeal for the Fifth Circuit on June 15, 1993, rehearing denied July 29, 1993.

Jurisdiction of this Honorable Court is invoked under the provisions of Title 28 U.S.C. § 1254(1) and Rules 10 through 16 of the Rules of the Supreme Court of the United States.

STATUTES AND RULES APPLICABLE TO THIS CASE

The following statutes and local rules of the United States District Court for the Eastern District of Louisiana are applicable to this case:

Local Rule 2.09 **Motions for Summary Judgment.** Every motion for summary judgment shall be accompanied by a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

---

[1] Petitioner is Cynthia Ann Kelley, individually and on Behalf of her Minor Children, Jerred Seth Kelley and Cindy Lynn Kelley. Respondent is Industrial Refrigerated Systems, Inc., wholly-owned by David and Linda McGowan and insured by Truck Insurance Exchange.

Rule 56(c), Federal Rules of Civil Procedure: **Motions and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Courts Below.

On July 5, 1987, Jack Kelley was mangled to death by a screw auger at an ice plant in Golden Meadow, Louisiana (Appendix K). On July 1, 1988, Cynthia Kelley filed the instant suit against Industrial Refrigerated Systems, Inc., the seller of the ice plant. On March 17, 1991, the District Court GRANTED plaintiff's motion to strike defenses relating to "victim fault," in accordance with the Louisiana Supreme Court's decision in *Bell v. Jet Wheel Blast,* 462 So.2d 166 (1985).

A jury trial commenced October 7, resulting in a verdict in favor of Industrial as to both manufacturer and seller liability. On plaintiff's motion, a new trial was granted (Appendix E). On April 10, 1992, Industrial filed a motion for Summary Judgment asserting, pursuant to

Local Rule 2.09, that it was not the manufacturer but only the seller of the ice storage bin. *No statement was made regarding the "open and obvious danger" defense as an uncontested fact.* The motion was set for hearing April 29, 1992. Counsel for plaintiff was out of town during the week of April 13 and did not discover the motion until late Tuesday, April 21. Counsel for plaintiff contacted mover's counsel to obtain agreement to an extension, which was given late Wednesday, April 22, 1992 and counsel would have filed the unopposed motion for additional time on Thursday morning but for the murder of Jack Bartlett, a close friend and neighbor, on Wednesday night, April 22, 1992. Unbeknownst to plaintiff's counsel, however, the Court had already granted Industrial's motion as "unopposed" on Wednesday morning, April 22, 1992, and had already entered Judgment of dismissal. Counsel for plaintiff was apprised of the court's action Friday morning when he called the Court's law clerk to confirm the next available date for hearing motions. (See Affidavit, Appendix H at A-77).

A specific response addressing the merits of the motion, and a Motion for Reconsideration were filed April 28, 1992. On May 25, 1992, the Court DENIED plaintiff's motion for Reconsideration, allegedly ruling on the "merits" of the motion. Notice of Appeal was filed on May 28, 1992. The Fifth Circuit Court of Appeals AFFIRMED on June 15, 1993. Plaintiff's separate motions for rehearing and for en banc consideration were DENIED on July 29, 1993.

The jurisdiction of the Court of Appeals in the first instance was based on Title 28 U.S.C. § 1291.

B. Statement of Facts.

The Demere family, which owned property in Leeville, Louisiana, along Bayou Lafourche, decided in the summer of 1986 to purchase an ice plant to serve fishing boats. On January 5, 1987, Delton Demere received a visit from representatives of Industrial Refrigerated Systems, Inc., which held itself out to be "Refrigeration Specialists." The indication was that Industrial would supply a *complete* ice plant, a "turnkey" operation, and an agreement was reached whereby Industrial would sell Delton Demere a complete ice plant for a total price of $259,716.

The component parts were all selected by Industrial and included an automatic delivery system with a "screw-type auger" intended to move the ice to the center of the silo, where it would drop through an opening onto a conveyor belt. The auger was modified to add "teeth" to help the operation. The Demeres had no knowledge regarding any of the component parts or the manner in which they would be assembled.

The plan was to have the plant ready for the shrimping season, in late April or early May. Sometime in late May, the plant was ready to be tested. A pre-start meeting was held at which Industrial representatives Lawrence Olinde and David McGowan were present. During that meeting, a start-up demonstration was held wherein David Easley, a long-time cohort of McGowan and Olinde, threw a metal shovel into the auger, which literally "ate" the shovel. The mutilation of the shovel by the auger was witnessed by McGowan and Olinde long before Jack Kelley was hired. At the time the auger ate the shovel, certain

warning stickers were supposed to have been placed along the bin, near the access doors, *but were not used.* These warning stickers, long available in the industry,[2] were specifically designed to warn potential users of the dangers inherent in the auger. (Appendix J)

After the initial start-up, the plant continuously had problems, attributable to the fact that it was improperly insulated and the ice would "clump up" or "freeze up."[3] Despite various attempts, the problem prevailed, and the plant never functioned in the manner that Industrial had promised on January 5, 1987.

During the time the plant was being assembled, Jack Kelley was working for Demeres' Seafood, Inc. While at the seafood company, Jack Kelley did not have any duties or responsibilities regarding running the ice plant. Steve Fillimich was in charge and Jack Kelley received no train-

---

[2] See, J.B. Sevart, P.E. *Reducing Risk of Bottom Unloaders by Control System Design*, presented at the 1985 Mid-Central meeting of the American Society of Agricultural Engineers. This treatise was presented to the District Court as part of plaintiff's "Jet-Wheel Doctrine" Motion, which resulted in the court granting the motion, presumably eliminating "victim-fault".

[3] *Fillimich*, pp. 35 and 36, Excerpt 26; *Wayland Demere*, p. 107, Excerpt 28; *Dalton Demere*, p. 90, Excerpt 27:

A. Somebody had to get in there and stop the ice, or chop the ice with a shovel to keep it from just pushing around freely.
Q. And would somebody have had to get in there while the auger was on?
A. Yes, sir, to get any ice.

(References are to "excerpts" filed with the Court of Appeals)

whatsoever.[4]

On July 5, 1987, Steve Fillimich was doing what he had to do to obtain ice after any period of non-use:[5] chopping the frozen ice inside the auger so that it would feed down to the conveyor belts. Fillimich was not the only one who had gone inside the bin to break up ice. When he couldn't, his son had done so. Steve Dufrene had also entered the bin to break up ice. And while Fillimich testified that he "thought" Jack Kelley had done so once before, the evidence regarding Jack Kelley's prior experience was sparse and inconclusive.[6]

On the morning of July 5, 1987, Fillimich turned on the auger, entered the bin and began breaking up the ice. When Jack Kelley arrived, Fillimich gave Kelley the shovel and switched places while he (Fillimich) went outside to feed the ice into a truck.[7] While Fillimich handled the hose, the auger caught Jack Kelley, denuded him in the process,[8] and mangled him to death.—

---

[4] *Damas Demere*, p.185, Testimony, October 8, 1991:

> Q. Okay. so Jack Kelley didn't have — didn't have — to operate the machinery at all; is that right?
>
> A. No, basically he just had the hose onto the truck and there was someone at the iceplant who would basically start the delivery process.

[5] The 4th of July weekend interrupted production. Fillimich testified that if the ice stayed two or three days, "you couldn't do nothing with it." *Fillimich*, p. 35, Excerpt 26.

[6] *Fillimich*, p. 36, Excerpt 26.

[7] *Fillimich*, p. 37, Excerpt 26.

[8] Appendix K shows that Jack Kelley was naked. J.B. Sevart, plaintiff's expert, explained that once the auger catches its victim, it will rip away the clothing. (Excerpt 2, 000992 example # 3).

SUMMARY OF ARGUMENT

This case presents several reasons for Supreme Court review. First, the District Court *and* the Court of Appeals have both misappplied the law on summary judgment standards, emblematic of the confusion that has arisen in all circuits in applying the teaching of the three closely-divided Supreme Court decisions, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (5-4 decision); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (no majority decision); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (6-3 decision with Justices Brennan and Rehnquist authoring separate dissents). While the Court has changed slightly in the seven years since the last decision of the "trilogy" was issued, the confusion, and arguably the misunderstanding, of these cases in the circuits has not subsided, and this area of law should be revisited by the Court. Alternatively, the Court of Appeals so egregiously departed from accepted standards regarding summary judgments that this Court should grant certiorari. The tendency toward "trial by affidavit" is growing in the Fifth Circuit and concern over the misunderstanding of the *Cartett-Anderson-Matsushita* trilogy is widespread. See, *e.g. A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgments, Directed Verdicts and the Adjudication Process*, 49 Ohio State Law Journal 95 (1988).

Where such questions are important and recurring, the Supreme Court should grant certiorari to resolve them. *Glus v. Brooklyn Eastern Dist. Terminal*, 79 S.Ct. 760, 359 U.S. 231, 3 L.Ed.2d 770.(1959)

Secondly, the Fifth Circuit in this case did not pro-

perly apply clearly-enunciated Louisiana products liability law. While Louisiana once applied the "open and obvious danger" defense to products liability claims, in recent years, both the Louisiana Supreme Court[9] and the Courts of Appeal[10] have adopted a risk utility analysis in both premises and products liability claims. In this area of law, Louisiana joins virtually every other jurisdiction in the United States.[11] Therefore, defendants cannot claim that the Fifth Circuit anticipated a trend in Louisiana law. On the contrary, the Fifth Circuit's decision in Kelley regresses from the direction the Louisiana courts have taken.[12]

Under our federalist system, a federal court cannot substitute its judgment on state law for that of the state on substantive matters. Nor can it apply rejected law from a sister state.

---

[9] *Oster v. Department of Transp. & Dev.*, 582 So. 2d 1285, 1289 (La. 1991).

[10] *Putman v. Gulf States Utils.* 588 So. 2d 1223, 1229 (La. Ct. App. 1991).

[11] The Court of Appeals relied on two *Mississippi* cases: *Melton v. Deere & Co.*, 887 F.2d 1241, 1244 (5th Cir.1989) and *Gray v. Manitowoc Co.*, 771 F.2d 866, 871 (5th Cir. 1985). On March 25, 1993, however, the Mississippi Supreme Court issued its opinion in *Sperry-New Holland v. Prestage*, 617 So.2d 248, declaring that Mississippi has adopted the "risk utility" analysis since 1987.

In obedience to the Mississippi Supreme Court, the Fifth Circuit REVERSED its prior rulings on two pending "open and obvious danger" cases from Mississippi. See, *Satcher v. Honda*, 993 F.2d 56 (5th Cir. 1993).

It is difficult to understand why this panel decided against Kelley on June 15, 1993 when another panel decided the opposite on May 28, 1993.

[12] Not only did the court fail to discuss *Oster* and *Putman*, it relied on, in its own words, "the only case actually decided on the issue of the obviousness of the danger," *Kelley*, at 1415 n.11 *and that case was reversed by the Supreme Court*, 558 So. 2d 1117 (La. 1990).

Thirdly, even if the Court had applied the correct law, it still should have reversed the District Court based on the federal standard for review of summary judgments. The decision in this case is inconsistent with Fifth Circuit precedent *and* precedent in other circuits against granting summary judgment in products liability cases, as well as precedent against granting summary judgment where the issue of "state of mind" is a key element.

Fourthly, Industrial defended on the ground that it "...was *never* aware of any alleged dangerous or unsafe condition in the equipment at any time prior to the accident involving Mr. Kelley." *Id.* at 1415. Thus, the court resolved two *inconsistent* propositions in favor of the defendant: (a) that Industrial's president was unaware of any dangerous condition, and (b) that a recently hired[13] employee recognized as "obvious" the extreme *extent* of the danger from this auger. Because the affidavit filed by McGowan disclaimed knowledge of the danger, the "open and obvious" defense *was not included in the Statement of Uncontested Facts initially filed by Industrial.* The court grievously erred in affirming summary judgment.

Finally, the lethality of screw-type augers is not a matter limited to south Louisiana bayous. As revealed by documents submitted to the Court, unsuspecting workers are killed and maimed by these type of augers throughout our nation. *Application of Interlocks, Deadman Controls and Emergency Stop Devices as a Design Strategy to Reduce Risk Associated with Agricultural Machinery,* J.B. Sevart, P.E., 1982 Presentation at the 1982 Mid-Central

---

[13] Kelley had only been employed at the ice plant for a short period prior to his fatal accident, Damas Demere testimony, p. 175.

Meeting of American Society of Agricultural Engineers, making reference to agriculture as "...the most dangerous occupation in the United States...";[14] *Reducing Risk of Bottom Unloaders by Control Design Systems,* J.B. Sevart, P.E., 1985 Presentation to the Mid-Central Meeting of the American Society of Agricultural Engineers.

The Supreme Court has often granted certiorari for reasons involving "...the protection of the public health..." *Flemming v. Florida Citrus Exchange,* 1958, 79 S.Ct. 160, 358 U.S. 153, 3 L.Ed. 2d 188. Part of the resolution of our health crisis should include the elimination of accidents. The Court of Appeal decision in Kelley actually creates a negative incentive to manufacturers:

Make the danger obvious and thereby avoid liability!

ARGUMENT AND LAW

QUESTION NUMBER 1

IS THE FIFTH CIRCUIT'S AFFIRMING OF SUMMARY JUDGMENT IN THIS PRODUCTS LIABILITY CASE (a) EMBLEMATIC OF THE CONFUSION THAT HAS ARISEN IN THE APPLICATION OF THE *CATRETT-ANDERSON-MATSUSHITA* TRILOGY, OR (b) A CLEAR DEPARTURE FROM ACCEPTED STANDARDS REGARDING SUMMARY JUDGMENTS?

Both courts and commentators have remarked that

---

[14] This statistic is taken from "Accident Facts" 1981 Edition, *National Safety Council.*

the *Catrett-Anderson-Matsushita* trilogy has left the circuits in some confusion about the burden-shifting analysis applicable to summary judgment motions. *E.g., Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 607 (11th Cir. 1991) ("Of the three, *Celotex* is the most notable, not because it significantly changed summary judgment law, but because it is so commonly misunderstood and misapplied."); Brian L. Weakland, *Summary Judgment in Federal Practice: Super Motion v. Classic Model of Epistemic Coherence*, 94 Dick. L. Rev. 25, 26 (1989) ("Several years have passed since the Supreme Court announced its liberal standards for summary judgment. During that time, lower courts have continued their struggle to apply the proper summary judgment standards to the factual situations before them."); James V. Chin, *the Eleventh Circut Clarifies the Initial Burden in a Motion for Summary Judgment*, 26 Ga. L. Rev. 1009, 1018-19 (1992) ("Although commonly misinterpreted, the Supreme Court's decision in *Celotex* requires the moving party first to meet its initial burden of showing that no factual issues warranting a trial exist before the non-moving party must produce evidence in opposition to the motion.") (footnotes omitted).

Nowhere is the burden-shifting standard for summary judgment more inconsistently applied than in the Fifth Circuit, especially in regard to diversity issues where state law controls disposition of the underlying claim—including burden of proof—while federal law controls the procedures for summary judgment. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938); *Hanna v. Plumer*, 380 U.S. 460, 470-473 (1965). The result has been a series of arbitrary Fifth Circuit decisions in the products liability area, some affirming summary judgment based on the non-

movant's failure to meet the burden of proof, *e. g., Russ v. International Paper Co.*, 943 F.2d 589, 593 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1675 (1992); *Kelley*, 992 F.2d at 1413, while others find that "[s]ummary judgment is rarely appropriate in negligence and products liability cases, even if the material facts are not in dispute," *Little v. Liquid Air Corp.*, 952 F.2d 841, 847 (5th Cir. 1992); *Question No. 3, infra*.

The distinguishing factor appears to be how the Fifth Circuit has approached the *Celotex* burden-shifting analysis. *Celotex* is properly read as shifting the burden of *production* only where the nonmovant clearly bears the burden of proof at trial;

> "*Celotex* simply holds that under certain circumstances the movant may meet its Rule 56 burden without negating an element of the non-moving party's claim and that under such circumstances it is sufficient to point to materials on file that demonstrate that the party bearing the burden of proof at trial will not be able to meet that burden. Even after *Celotex* it is never enough simply to state that the non-moving party cannot meet its burden at trial."

Clark, 929 F.2d at 608. *See also* Chin, *supra*, 26 Ga. L. Rev. at 1019 ("*Celotex* merely provides another way to meet the initial summary judgment burden in cases where the non-moving party has the burden of proof at trial.") (footnote omitted).

This Court decided *Anderson* on the same day the *Celotex* opinion was issued, and held that the District Court could consider the quality and quantity of proof required of the claimant to prove his or her case. *Anderson*

was a libel decision, and the claimant needed clear and convincing proof to prevail. However, the decision in *Anderson* cautions courts *not* to weigh conflicting evidence, but instead to preserve evidentiary matters for the jury:

> "Lest trial courts believe they have free reign to make quality and quantity determinations of the evidence, the court adopted language to create some pause. For example, the Court stated that evidence may be 'so one-sided that a party must prevail as a matter of law,' but the judge 'must ask himself not whether he thinks the evidence unmistakably favors one side or the other.' The Court also noted that the trial judge may consider the insufficient caliber or quantity of evidence, but may not usurp jury functions, including '[c]redibility determinations, weighting the evidence, and the drawing of legitimate inferences from the facts.' "

Weakland, *supra*, 94 Dick. L. Rev. at 39 (quoting *Anderson*, 477 U.S. at 252, 254, 255) (footnotes omitted).

The Fifth Circuit's approach in the case *sub judice* did not follow the customary instructions in *Anderson* but instead adopted a more simplistic approach to the burden of "proof" at summary judgment:

> As the moving party, Industrial bears the initial burden of establishing that there are no genuine issues of material fact. Industrial must sustain this burden by informing the court of the basis for its motion, and by identifying portions of the record which reveal that there are no genuine issues for trial. Once such a showing is made,

> however, the burden shifts to Kelley to set out specific facts in the record showing that a genuine issue exists."

Kelley, 992 F.2d at 1413 (citations omitted). In fact, under Louisiana law, Kelley does not have the burden of proving that the auger was *not* an open and obvious danger, but only that the product was unreasonably dangerous and that, on balance, the utility of warning and the risks of the product created a duty to warn. *Putman*, 588 So. 2d at 1229. Moreover, Kelley's motion and single affidavit did *not* identify any "...portions of the record" to support the motion.

Additionally, the "open and obvious danger" rule — abrogated in Louisiana — requires at least a two-step process, and the defendant bears the burden of production on one step of that process. The claimant first shows that the product is dangerous; the defendant then argues that the danger is obvious. Most often the "obvious danger" rule is referred to as an affirmative *defense*. Here, Defendant never truly raised the "open and obvious danger" rule in its summary judgment motion; instead the court raised it *sua sponte*.[15] This analysis placed a burden at Plaintiff's feet which she did not have under state law, and which Defendant's summary judgment itself did not raise.[16]

---

[15] This appears to be a practice unique to the Fifth Circuit, one which utterly confounds the *Celotex* burden-shifting analysis, as noted by Senior Circuit Judge Roney in his dissent to *Russ:* "Raising this argument at this juncture suggests a misunderstanding of the proper placement of burdens in a summary judgment proceeding. *The opposing party has no obligation to produce evidence concerning an argument that has not been raised.*" *Russ*, 943 F.2d at 594 (Roney, S. Cir. J., dissenting).

[16] Moreover, the Fifth Circuit did not follow the admonition of the Court in *Anderson* against weighing the evidence, as more fully discussed *infra*, Question Number 3.

Finally, recent decisions of the Louisiana Supreme Court reject summary judgment in products liability cases, including the only "duty to warn" case cited by the Fifth Circuit in *Kelley*. The Fifth Circuit relied on *Hopper v. Crown*, in which the Louisiana Court of Appeals held that the seller had no duty to warn of open and obvious dangers, and that if the design was so apparent that the seller should have known it, "then it should have been apparent to the plaintiff as well . . . ." 555 So. 2d at 49. The Louisiana Supreme Court reversed without an opinion, which reverses the entire case.[17] However one Justice concurred with reasons worth setting forth verbatim:

> When a product is unreasonably dangerous in normal use and the seller knew or should have known of the defect, the seller has a duty to warn of the defect.
>
> "Whether the lack of a door or a restraining device rendered the forklift unreasonably dangerous in normal use is a contested issue of *fact and law to be decided at trial.* If it is assumed for purposes of the summary judgment in this case that the product was unreasonably dangerous, the seller might still prevail if the defect was obvious to the ordinary user. However, an ordinary user *may not generally realize the dangerous nature* of the product deficiency at issue in this case, and the seller may have the duty to warn, depending upon the seller's knowledge of the defect. Because the seller's motion did not establish that it neither

---

[17] The Fifth Circuit incorrectly refers to the reversal as "rev'd on other grounds." *Kelley*, 992 F.2d at 1413.

> knew or should have known of the defect (proof of which will not take place until trial), summary judgment was inappropriate."

558 So. 2d at 1117 (Lemon, J., concurring) (footnotes omitted). *See also Tillman v. Johnson*, 612 So. 2d 70, 70 (La. 1993) (reversing entry of summary judgment for defendant because "the filings in this case indicate that there is a genuine dispute as to whether the lead-based paint on the defendants' respective properties presented an unreasonable risk of harm to the petitioner's minor child for purposes of strict liability under La. Civ. Code art. 2317. This is a disputed issue of mixed fact and law or policy *that is peculiarly a question for the jury* or trier of the facts.")

The Fifth Circuit misapplied both the teaching of *Celotex-Anderson-Matsushita* and underlying Louisiana law in awarding summary judgment. This decision constitutes a clear departure from accepted standards or a misunderstanding of the Supreme Court's teaching. In either event, certiorari should be granted.

QUESTION NUMBER 2

DID THE FIFTH CIRCUIT MISAPPLY LOUISIANA PRODUCTS LIABILITY LAW IN THIS DIVERSITY CASE BY SUMMARILY RULING ON AN "OPEN AND OBVIOUS DANGER" DEFENSE WHICH IS NO LONGER RFECOGNIZED IN LOUISIANA OR IN THE VAST MAJORITY OF OTHER JURISDICTIONS?

Under Louisiana law a seller has a duty to warn of

the unreasonably dangerous properties of any product he or she sells. This duty is the same as the manufacturer's duty in all respects except that the seller is not presumed to have knowledge of any defects, nor is the seller required to inspect the product prior to sale to determine the existence of any defects. *Nelton v. Astro-Lounger Mfg. Co.*, 542 So. 2d 128, 131 (La. Ct. App. 1989); *Martin v. Henderson*, 505 So. 2d 192, 195 (La. Ct. App. 1987). Whether a duty to warn exists, and if so, what warning is adequate, is interwoven with the risk-utility analysis. In *Putman*, the court applied a straightforward risk-utility analysis to determine the existence and breadth of that duty: "When determining the existence or scope of a duty, a court 'should consider a broad range of social, economic, and moral factors including the cost to the defendant of avoiding the risk and the social utility of the plaintiff's conduct at the time of the accident.' " 588 So. 2d at 1229 (quoting *Oster*, 582 So. 2d at 1289).

This analysis has been adopted by nearly every jurisdiction in the United States, including Mississippi, which had long held onto the "open and obvious danger" defense[18]: *Union Supply Co. v. Pust*, 583 P.2d 276, 284 (Colo. 1978)[19]; *See also* Theresa Ludwig Kruk, Annotation, *Products Liability: Modern Status of Rule That There Is No Liability for Patent or Obvious Dangers*, 35 A.L.R.4th 861 (1987 & Supp. 1993); Aaron D. Twerski, *From Risk-*

---

[18] See Footnote 11.

[19] There, the *en banc* court rejected the open and obvious defense, noting that "[t]he apparent origin of the open-and-obvious rule was in the case of *Campo v. Scofield*, 95 N.E.2d 802 (N.Y. 1950), which has been recently overruled in *Micallef v. Miehle Co.*, 348 N.E.2d 571 (N.Y. 1976) From its inception, it has been frequently attacked by courts and legal scholars."

Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation, 11 Hofstra L. Rev. 861, 933 (1983). While advocating more "screening" or dismissals of product claims, Professor Twerski concedes that"[i]f the warning case gets beyond the judge and into the hands of the jury, it is difficult to sustain the contention that on risk-utility grounds, the warning need not have been given." Finally, see W.K. Viscusi, *Wading Through the Muddle of Risk-Utility Analysis,* 39 Am. U. L. Rev. 573, 580-84, 601-605 (1990).

Interestingly enough, the Fifth Circuit observed in this case that "[a]lthough the tension between Louisiana's new, pure comparative fault system and the 'obvious danger rule' *is clear,* to date, no Louisiana court has directly addressed the issue." *Kelley,* 992 F.2d at 1415 n.11. This is not correct. *Putman* does address the issue, applying the risk-utility analysis to determine the contours of any duty to warn case. Louisiana simply does not recognize the "open and obvious danger" rule as a bar. Rather, Louisiana applies a comparative negligence analysis.[20]

The Colorado Supreme Court addressed this very issue head-on in *Camacho v. Honda Motor Co.,* 741 P.2d 1240 (Colo. 1987), *cert. dismissed,* 485 U.S. 901 (1988). The plaintiff in *Camacho* sued Honda alleging that the motorcycle he purchased was unsafe and defective because it was not equipped with "crash bars" *and* because "the failure to provide adequate warnings rendered the Honda Hawk motorcycle unreasonably dangerous." *Id.* at 1248. The

---

[20] Here, the lethality of the auger was such that we moved the Court to strike defenses based on "victim fault". The Court granted the motion pursuant to *Bell v. Jet Wheel Blast, supra.* Somehow, this ruling has been lost in the shuffle. (Supplemental Appendix, "L" and "M")

lower court had granted Honda summary judgment on both theories, in part because of the obvious danger to one's legs from riding a motorcycle. The Colorado Supreme Court rejected this open-and-obvious defense, holding that the duty to warn must be subjected to a risk-utility analysis: "As this court has previously ruled, a duty to warn may exist where the danger is patent *if such warning might reduce the risk of harm* attendant upon use of the product. . . . We conclude that the efficacy of providing a warning is an appropriate issue for further inquiry by the trial court on remand." *Id.* at 1248 & n.9 (citing *Union Supply Co. v. Pust,* 583 P.2d 276) The *Camacho* analysis parallels that of the Louisiana Court of Appeals in *Putman,* which in turn relied on the rationale of the Louisiana Supreme Court in *Oster.*

The Fifth circuit admitted that the Louisiana Court of Appeals' decision in *Hopper* was the only duty-to-warn case it considered, and the Louisiana Supreme Court reversed that decision.[21] The Fifth Circuit simply misapplied Louisiana law on duty to warn. Louisiana law requires that the jury apply a risk-utility analysis to determine whether the seller had a duty to warn, and this case should be remanded for further proceedings consistent with Louisiana state law, as the Fifth Circuit itself recognized in *Satcher,* 993 F.2d at 57.

---

[21] Moreover, in subsequent proceedings the Louisiana Court of Appeals reversed the trial court's entry of summary judgment in favor of the seller of the product, whom plaintiff had sued on a duty-to-warn theory. Plainly the open-and-obvious-danger rule did not apply. *Hooper v. Crown,* 560 So. 2d 890, 891-92 (La. Ct. App. 1990).

QUESTION NUMBER 3

IS THE FIFTH CIRCUIT DECISION IN THE CASE AT BAR INCONSISTENT WITH PRIOR DECISIONS OF NOT ONLY THE FIFTH, BUT OTHER CIRCUTS, WHICH HAVE ESTABLISHED A RULE AGAINST (a) GRANTING SUMMARY JUDGMENT IN PRODUCTS LIABILITY CASES AND (b) GRANTING SUMMARY JUDGMENT WHERE THE ISSUE OF "STATE OF MIND" IS A KEY ELEMENT OF THE DEFENSE ALLEGED?

The Fifth Circuit Court of Appeals correctly stated that the question of the danger presented by the auger was primarily a question of fact under Louisiana law. *Kelley*, 992 F.2d at 1418. Yet it decided that summary judgment was appropriate despite conflicting evidence on the obviousness of the danger. The Court of Appeals made the improper determination that no reasonable jury could possibly find in favor of plaintiff, notwithstanding the teaching in *Anderson* that it should not weigh conflicting evidence to do so. Here, substantial evidence made the extent of the danger from the auger *not* "open and obvious" to Jack Kelley.[22]

Kelley was never warned nor could he realize the *extent* of this danger, as hard facts in evidence reveal. Indeed, the Court took cognizance of photographs of the auger's invisibility when submerged in the ice, yet disregarded the factual issue created by the photograph. Moreover, the Court quoted witnesses who saw the machine grab and

---

[22] Actually, it wasn't "open and obvious" to any of the workers who entered the bin. Fillimich sent his son to shovel ice!

"eat" a metal shovel *as if that meant that Kelley was aware:*

> " 'We had seen what it would do that day. I believe David Easley was holding a shovel, and [the auger] pulled it out of his hand, and, you know, *it was a revelation for us.*' "

Kelley, at 1416, quoting Delton Demere's testimony.

While the court conceded that Demere only realized the danger once *he* "...had seen what it could do..." *id.* at 1417, the Court ignored the fact that the employees *habitually* went into the machine to break up ice, *id.* at 1410, and that they " 'figured' it 'was part of [their] job' " to do so, *id.* at 1417. The Court's ultimate conclusion that "the question of whether the danger presented by the auger-equipped bin was obvious — that is, whether it presented a danger that should have been known to Jack Kelley under the circumstances *is also primarily a question of fact,*" *id.* at 1418, should have precluded summary judgment!

The "Rarely Appropriate" Rule. The decision in the case at bar is inconsistent with various decisions in the Fifth Circuit which have established a rule against the granting of a summary judgment in products liability cases, to the effect that:

> "The use of Summary Judgment is rarely appropriate in negligence or products liability cases, even where material facts are not disputed..."

Davidson v. Stanadyne, Inc., 718 F.2d 1334, 1338 (5th Cir.

1983); *Trevino v. Yamaha Motor Corp., U.S.A.*, 882 F.2d 182, 184 (5th Cir. 1989); *Miller-Schmidt v. Gastech, Inc.*, 864 F.2d 1181, 1185 (5th Cir. 1989); *Lavespere v. Niagara Machine & Tools Works*, 910 F.2d 167 (5th Cir.1990); *Little v. Liquid Air, supra*[23] See also, 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2729.

The rule that summary judgment is "rarely appropriate" in products liability cases has also been adopted by at least the 6th, 7th and 8th circuits. *Hughes v. America Jawa, Inc.*, 529 F.2d 21, at 23 (8th Cir. 1976); *Trotter v. Anderson*, 417 F.2d 1191 (7th Cir. 1969); *Rogers v. Peabody*, 342 F.2d 749 (6th cir. 1965); and *Daughenbaugh v. Bethlehem Steel*, 891 F.2d 1199, at 1205 (8th Cir. 1989).

The "State of Mind" Rule. Summary judgments where the "state of mind" of a party is an issue are also inappropriate. Although the majority in *Anderson* rejected a "state of mind" argument in that libel case, it seems to have done so because the respondent, relying on *Poller v. CBS*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed. 2d 485 (1962) argued that a jury could simply disbelieve testimony given. Here, proof of Kelley's "state of mind" or proof of his awareness of the alleged danger was an essential element of a defense. Such a positive conclusion — that "...on the morning of July 5, 1987, when Jack Kelley climbed into the small service door on the ice bin, *he knew what was inside*", *Id* at 1417, is simply insusceptible of summary judgment determination.

This was the clear holding of Judge Wisdom in

---

[23] *En banc* rehearing was ordered January 28, 1982, and the matter was argued in May of 1982. No decision has been rendered on the *en banc* rehearing.

Crowley v. Matson Navigation, 434 F.2d 72, at 73 (5th Cir.1970), which remains properly undisturbed. There, summary judgment was granted on the grounds that the plaintiff should have been fully aware of the danger inherent in working on a "dead ship" which gave off explosive vapors. The motion was based on the premise that "...there is no duty of the owner to warn the employees of the contractor if they are already fully aware of the danger..." at 75. In deciding that "knowledge" of danger was not susceptible of summary disposition, the Court held, at 77;

> "Knowledge on the part of the company can be proved only by showing the state of mind of its employees. *The court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of state of mind.*"

Even in whatever jurisdictions cling to the obvious-danger rule, the seller or manufacturer has a duty to warn if the user would recognize *some* danger from the product, *but not the extent* of the danger:

> "[A] warning may be required even where the defect complained of is readily apparent *if the extent of the danger may not be fully anticipated by an ordinary user of the product.* Moreover, there may be a duty to warn of an obvious defect in a product if the defect renders the product unreasonably dangerous despite its obviousness."

American Law of Products Liability 3d § 1:70, at 76 (Timothy E. Travers managing ed., 1987) (footnotes

omitted).

Jack Kelley's state of mind was that of a worker doing his job. Because the warning signs which we have annexed as Appendix J were not utilized, Jack Kelley's mind was not alerted to the danger. Not only does the law require that the warning be given, but also that the signs be located in a manner likely to catch the user's attention. *Easton v. Chevron,* 602 So.2d 1032 (4th Cir.1992).

The Court of Appeals gravely erred in affirming summary judgment under facts from which various inferences could be drawn.

QUESTION NUMBER 4

DID THE FIFTH CIRCUIT PROPERLY GRANT SUMMARY JUDGMENT OF GROUNDS NOT RAISED BY THE MOVER'S MOTION?

Rule 2.09 of the Local Rules of the Eastern District of Louisiana provides that the mover for summary judgment state concisely those material facts as to which there is no factual dispute. This is the foundation of any motion for summary judgment. In the absence of an affirmative statement by the mover, no duty shifts to the non-mover. *Celotex, supra.* In this regard, the motion filed by Industrial had the following incomplete "Statement of Uncontested Facts" (Appendix F at A-65):

I. The accident which forms the basis of this suit occurred on July 5, 1987.

II. The accident occurred in an ice storage bin manufactured by Price-Macemon/Rochester Silo.

III. The ice storage bin was not manufactured by Industrial Refrigerated Systems, Inc. Instead, Industrial Refrigerated Systems, Inc. acted only as the retail seller of the ice storage bin.

This statement of material facts does not speak to the issues decided on appeal, and did not shift *any burden* to the non-mover. At least the following material matters were *not* raised by Industrial's 2.09 certification of uncontested material facts: (a) No statement is made that *Industrial had no knowledge of the defect.* (b) No statement is made that *the product sold was not dangerous* (c) No statement is made that *the product sold was not defective.* (d) No statement is made that *an adequate warning was given.* (e) No statement is made that *adequate steps to protect the user were taken.* **(f) No statement is made that the danger was open and obvious.**

Indeed, the motion for summary judgment was supported *solely* by the affidavit of David McGowan, who swore as follows (Appendix F at 68):

> "...IRS was never aware of any alleged dangerous or unsafe condition in the equipment at any time prior to the accident involving Mr. Kelley."

Under these circumstances, the District Court could not even have granted an unopposed motion. Under these circumstances, the Court of Appeals could not have affirmed a summary judgment, which it must review *de novo.*

QUESTION NUMBER 5

IS THE LETHALITY OF SCREW-TYPE AUGERS A MATTER OF NATIONAL CONCERN SO AS TO WARRANT CONSIDERATION OF THIS CASE BY THE SUPREME COURT?

The lethality of screw-type augers is a matter of *national concern.* We believed that the "Jet Wheel" doctrine applied and so moved, *in limine.* The District Court granted our motion but did not actually exclude evidence of "victim fault". The Fifth Circuit did not deal with the issue because it affirmed summary judgment. We believe that the application of the "Jet Wheel" doctrine to machinery as lethal as the auger involved herein is a matter of exceptional *societal* importance. As we have previously stated in this application, agriculture is "*...the most dangerous occupation in the United States...*"[24] In his papers to the American Society of Agricultural Engineers, J.B. Sevart has *criticized* the industry argument that safety would be best insured by (a) providing warnings and (b) instructing operators to turn the machine OFF when leaving the operator position. In criticizing this utopian concept, Mr. Sevart's research paper noted that the strategy had failed miserably "...to reduce the number and severity of the injuries associated with agricultural equipment..." Regarding the foreseeability of what happened to Jack Kelley, Mr. Sevart wrote, as follows:

> "No human operator can be expected to be one hundred percent perfect. Who hasn't run a stop sign or a red light even though he had traveled the route many times and in fact, the number of times the route had been traveled may be a dominant factor in the incident. *It is most foreseeable that boredom, fatigue, worry, inexperience,*[25] *and*

---

[24] The orbital bin at issue was typically used to convey grain, but had been adapted to convey ice by Rochester Silo.

[25] In the case at bar, Jack Kelley was inexperienced with the perils of the auger:

(a) He wasn't there when the auger ate the shovel;

a host of other factors deny the existence of the perfect operator."

In the remainder of his paper, Mr. Sevart suggested the use of interlocks, dead-man controls, and emergency stops, all of which were available when *this* ice plant was assembled in Lafourche Parish in 1987. Detailed references to national publications were included in our original brief to the Court of Appeals, p 21 - 26. Our suggestion for *en banc* rehearing raised issues regarding the *societal* importance of the issues raised. (Supplemental Appendix N)

An unfortunate by-product of decisions such as this are that manufacturers and sellers will not have an incentive to make products safer. Rather, a manufacturer or seller stands to be rewarded by removing guards so as to "reveal" the dangers inherent in machninery.

Such a trend is dangerous indeed and this Court's role in rendering decisions which have *societal* impact would be furthered by granting certiorari.

---

footnote 25 continued.

(b) when he worked inside the bin, the ice masked the danger (Appendix D). *See also,* Plaintiff's Exhibit "J"; and

(c) when he was killed, it was, *at best,* Jack Kelley's second time inside the bin.

CONCLUSION

The Fifth Circuit Court of Appeals, relying on *rejected law,* departed from accepted standards, misunderstood the requirement imposed upon a mover for summary judgment, disregarded the admonitions of this Court in *CATRETT-ANDERSON-MATSUSHITA* and granted summary judgment on grounds which other panels of the Fifth Circuit and other Circuits have declared "inappropriate".

Typically, litigants are too discouraged to seek redress by way of certiorari. The likelihood of success is marginal, the expense is high and the effort is substantial. Thus, many decisions by the Courts of Appeal go unchallenged, creating an impression of invincibility on the part of any given panel.

With all due respect, the decision below ought not go unchecked. Certiorari is warranted on the merits of the application, and should be granted to reverse a dangerous trend, characteristic of the Fifth Circuit, toward "trial by affidavit."

Certiorari should also be granted to review the validity of the "open and obvious danger" defense, which runs *against any national goal promoting safety.*

Respectfully submitted:

HENRY L. KLEIN, ESQ.
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

OF COUNSEL:

HEISLER & WYSOCKI

93-675

NO. (2)

Supreme Court, U.S.
FILED
OCT 27 1993
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1993

CYNTHIA KELLEY, INDIVIDUALLY
AND ON BEHALF OF HER MINOR CHILDREN
JERRED SETH KELLEY AND
CINDY LYNN KELLEY

PETITIONERS

versus

INDUSTRIAL REFRIGERATED SYSTEMS, INC.,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

HENRY L. KLEIN, ESQ.
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

Attorney for
Petitioners-Applicants

OF COUNSEL:
HEISLER & WYSOCKI

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

TABLE OF CONTENTS

PAGE

APPENDIX:

Appendix A - Opinion of Court of Appeals and Denial of Rehearing A-1

Appendix B - Extensions for Filing Applications for Rehearing A-27

Appendix C - Application for Panel Rehearing A-31

Appendix D - Motion to Submit Photographs to the Court A-53

Appendix E - Minute Entry Granting New Trial A-56

Appendix F - Motion for Summary Judgment, Statement of Uncontested Facts and Affidavit . . . A-63

Appendix G - Order and Reasons Granting Summary Judgment A-69

Appendix H - Motion for Reconsideration A-72

Appendix I - Memorandum in Opposition to Motion for Summary Judgment A-81

Appendix J - Photographs of Warning Decals A-88

Appendix K - Photograph of Jack Kelley's Torso in Auger A-90

APPENDIX A

Cynthia Ann KELLEY, Individually and on Behalf of Her Minor Children Jerred Seth Kelley and Cindy Lynn Kelley,

Plaintiff-Appellant
Cross-Appellee,

v.

PRICE-MACEMON, INC.,et al.,

Defendants,

Industrial Refrigerated Systems, Inc.,

Defendant-Appellee
Cross-Appellant.

No. 92-3511

United States Court of Appeals,
Fifth Circuit.

June 15, 1993.

Widow of ice plant employee killed by auger in ice bin brought products liability action against seller of bin. The United States District Court, Eastern District of Louisiana, George Arceneaux, Jr., J., after ordering new trial on issue of seller's liability, granted summary judgment in favor of seller. Widow appealed, The Court of Appeals, King, Circuit Judge, held that: (1) genuine issue of material fact as to whether seller of auger-equipped ice bin had knowledge of danger presented by bin precluded summary judgment for seller, but (2) auger-equipped ice bin

presented danger so obvious that seller had no duty to warn.

Affirmed.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before KING and EMILIO M. GARZA, Circuit Judges, and COBB*, District Judge.

KING, Circuit Judge:

After the tragic death of her husband in an ice-plant accident, Cynthia A. Kelley brought this products liability action against Industrial Refrigerated Systems, Inc., and other parties involved in the manufacture, installation, and sale of the ice plant. All named defendants except Industrial ultimately were dismissed from the action, and the case was tried to a jury, which returned a verdict in favor of Industrial. On Kelley's motion, however, the district court ordered a new trial on the sole issue of Industrial's liability as the seller of the plant. Industrial subsequently filed a motion seeking summary judgment on this same issue, which the district court granted.

Kelly now appeals, arguing that the district court erred in granting summary judgment. On cross-appeal, Industrial contends that the district court should never have ordered the new trial. After a careful review of the record, we conclude that the district court properly granted Industrial's motion for summary judgment. We therefore

---

*District Judge of the Eastern District of Texas, sitting by designation.

affirm the judgment of the district court, and we need not reach the question of whether the district court erred in granting the new trial.

I.

In January 1987, Industrial Refrigerated Systems, Inc., ("Industrial") contracted with Delton Demere to provide the equipment for an ice plant, which was to be assembled in Leeville, Louisiana, along Bayou Lafourche. The plant was designed to provide a fully automated, or "pushbutton," system for delivering ice for sale to local fishermen, shrimpers, and seafood companies. Its primary components were: (1) a commercial ice-making machine; (2) a large refrigerated storage bin or silo, in which bulk ice would be stored; and (3) an automated delivery system, which would move the ice out of the storage bin.

The delivery system consisted of a "sweep" auger—large rotating screws which pivoted around a gearbox in the center of the storage bin's steel floor, sweeping the floor and pulling the ice into a chute—and a conveyor belt, which then transported the ice out to the point of sale. On the side of the storage bin were four small service doors, which provided access to the inside of the bin. The system's control panel was located outside of the bin, near one of the service doors.

Pursuant to the contract, Industrial arranged for the delivery of the plant's component parts to the job site, while Demere built the foundation and made arrangements for the installation of the components. Price-Macemon, Inc., the manufacturer of the storage bin and auger, provid-

ed a factory representative to supervise the installation. By late May, the ice plant was fully installed and ready for operation. Prior to commencing commercial operations, however, Damas Demere, Delton's brother and the general manager of the ice plant, held a start-up meeting, at which time he, David Easley, the installation contractor, and representatives of Industrial conducted a walk-through of the plant. During this walk-through, the participants entered the ice storage bin to "work out" some problems with the auger and, while inside, saw the auger "mutilate" a metal shovel.[1] The participants later offered differing versions of the incident: Demere stated that Easley was holding the shovel, and the auger "pulled it out of his hand"; Easley stated that he "threw it in there" as a "demonstration."

From its first day of operation, the ice plant had problems. Apparently because the storage bin was inadequately insulated, a layer of ice at the top of the bin often would freeze or "clump" up while the ice-maker was not actually in production. When this clump of ice reached the bottom of the bin, the auger would not grab the ice and move it to the chute. Instead, the ice would "bridge," or stay on top of the auger, which then would push the ice around the floor of the bin. The result was a complete interruption in the delivery of the ice. Efforts to change the consistency of the ice produced by the ice-maker failed to remedy the problem. Consequently, it occasionally became necessary

---

[1] Screw augers are most commonly used to move grain. Apparently to facilitate the movement of ice, as opposed to grain, the leading edge of the auger, which is generally straight and smooth, had been modified by the addition of teeth to chop or grab the ice as it rotated.

for an ice-plant employee to climb into the storage bin to break up the ice clump with a pick or a shovel. In order to clear the ice from the bin as quickly as possible, plant employees developed the unfortunate practice of climbing into the bin while the auger was running, chopping the ice, and feeding it into the auger.

On the morning of July 5, 1987, Steve Fillimich, an ice-plant employee, turned on the delivery system, climbed into the storage bin, and began breaking up the approximately eighteen inches of ice that lay on the floor of the storage bin. When a second employee, Jack Kelley, arrived for work, he took over the ice-chopping duties inside the bin while Fillimich went outside to feed the ice into a truck. After several minutes, Fillimich noticed that the ice had stopped coming out of the bin. When Fillimich investigated, he discovered that Jack Kelley, who somehow had become entangled in the auger, was dead.

In July 1988, Cynthia Kelley filed this diversity action on behalf of herself and her two minor children, seeking damages arising from her husband's death. In her complaint, Kelly named as defendants eleven parties, including Industrial, allegedly involved in the manufacture, installation, and sale of the ice plant.[2] Prior to trial, however,

---

[2] In addition to Industrial, Kelley's complaint named as defendants: Price-Macemon, Inc. the manufacturer of the storage bin and auger; Rochester Silo, Price-Macemon's sucessor in interest; Turbo Refrigeration Company, Inc., the manufacturer of the ice-making machine; Delton's One-Stop, Inc. and Demere Seafood, Inc., Jack Kelley's employers; Demere's Ice Company, Inc., the owner of the ice plant; Boyd Refrigeration, the installer of the ice plant; Bollinger Machine Shop & Shipyard, Inc., the entity that cut the steel floor for the storage bin; and Moore Refrigeration, an entity which apparently had no connection whatsover to the case.

Kelley's claims against all defendants except Industial were dismissed.[3]

Kelley's claims against Industrial were tried before a jury in early October 1991. Kelley pursued two theories of liability. She argued primarily that Industrial, as the "manufacturer" of the ice plant, was strictly liable for her husband's death. Alternatively, she argued that, even if Industrial were found not to be the manufacturer of the plant, it nonetheless would be liable as the *seller* of the plant for its failure to warn of a dangerous condition. The jury returned a verdict in favor of Industrial, and the district court entered a judgment in accordance with the jury's verdict on October 11, 1991.

Kelly timely moved for a judgment notwithstanding the verdict or, alternatively, for a new trial. Concluding that "reasonable and fair-minded" jurors could have reached the same verdict, the district court denied Kelley's request for judgment notwithstanding the verdict. The court nevertheless granted Kelley's motion for a new trial on the sole issue of Industrial's liability as the *seller* of the ice

---

[3] Kelley's claims against the other defendants were dismissed for a variety of reasons. Price-Macemon, for example, was voluntarily dismissed as a party because it had ceased to exist, and Rochester Silo, Price-Macemon's successor in interest, had already been named as a defendant. The district court later severed Kelley's claims against Rochester Silo when it filed for bankruptcy. Kelley's attorney apparently never sought to lift the automatic stay imposed by the bankruptcy filing or otherwise pursue his client's claims against the manufacturer in the bankruptcy proceedings. Interestingly, the record reflects that Rochester Silo agreed to reimburse *Demere* for the purchase price of the bin and auger system because it was "real hard to sell ice [from the machine] after the accident."

plant.[4]

Thereafter, on April 10, 1992, Industrial filed a motion for summary judgment. In its motion, Industrial asserted that it was entitled to judgment as a matter of law because the summary judgment evidence demonstrated that it did not have knowledge of any defects or dangerous conditions in the ice plant and, alternatively, that it had no duty to warn of the auger's obvious danger. The motion was set for hearing on April 29. Thus, under Uniform Louisiana Local Rule 2.07E, Kelley was required to file her response to the motion for summary judgment on April 21, or eight calendar days prior to the hearing date.

Industrial's motion for summary judgment arrived at the office of Kelley's attorney, Henry L. Klein, on Monday, April 13. Mr. Klein, however, was out of town during the entire week of April 13 on a "combination vacation/brief-writing" trip. He allegedly did not discover the motion until late Tuesday, April 21. At that time, Mr. Klein contacted opposing counsel to request an extension of time in which to file his response, and he was informed that Industrial would not oppose an extension. Significantly, Mr. Klein failed to contact the district court on April 21 to request an extension.

The district court, having received no response from

---

[4] Industrial unsucessfully sought appellate review of the district court's order granting Kelley's motion for a new trial. It first requested the district court to certify the order for permissive appeal under 28 U.S.C. §1292(b), but the district court refused to do so. It then sought review of the district court's new trial order by a petition for mandamus with this court. The petition for mandamus, however, was denied.

Kelley on April 21, reviewed Industrial's motion for summary judgment without the benefit of opposition. It found the motion to have merit and therefore granted summary judgment in favor of Industrial. A judgment to that effect was entered by the district court on April 22. Thus, when Mr. Klein finally contacted the district court on April 24, he discovered that his client's action against Industrial had been dismissed.

Four days later, on April 28, Mr. Klein filed a motion for reconsideration and a short memorandum in opposition to Industrial's motion for summary judgment. In the motion for reconsideration, Klein argued that Kelley was entitled to relief from judgment under Rule 60(b)(1) of the Federal Rules of Civil Procedure on the grounds of inadvertence or excusable neglect.[5] The district court disagreed, but, "in an abundance of caution," reconsidered Industrial's motion for summary judgment "on the merits with the benefit of plaintiff's opposition." After considering Industrial's motion in light of Kelley's response, the district court concluded that, although a fact issue did exist with respect to Industrial's knowledge of the auger's dangerousness, Industrial nevertheless was entitled to summary judgment because the auger in which Kelley had become entangled presented an obvious danger against which Industrial had no duty to warn. Accordingly, the district court refused to grant Kelly relief from the April 22 judgment.

Both parties filed timely notices of appeal. Kelley ap-

---

[5] Mr. Klein explained that he "was veritably immersed" in meeting a briefing deadline in another matter, "which resulted in the inadvertent failure to notice that certain motions had been filed" in Kelley's case. Moreover, according to Klein, he would have filed an unopposed motion for extension of time with the district court on April 23 but for the murder of a close friend and neighbor on April 22.

peals from the district court's grant of summary judgment in favor of Industrial and from the district court's order refusing to grant relief from that judgment.[6] Industrial cross-appeals from the district court's November 13, 1991, order granting a new trial.

II.

Kelley argues on appeal that the district court erred in granting Industrial's motion for summary judgment and in refusing to grant her motion for relief from that judgment. Specifically, Kelly asserts, at least in her brief to this court, that the district court improperly granted Industrial's motion as "unopposed" because of her attorney's failure to file a timely response. Yet, as we have noted, *supra*, the record clearly discloses that the district court ultimately did address the merits of Industrial's motion and, in so doing, considered the "hastily-drafted" response offered by Kelley's attorney. Indeed, Kelley conceded this point at oral argument. Consequently, we need not address Kelley's specific argument that Industrial's motion was improperly granted as "unopposed." Moreover, because Kelley's concession also forecloses her argument that the district court erred in refusing to grant her motion for relief from judgment, Kelley's appeal presents only one question:

---

[6] Because Kelley's "Motion for Reconsideration" may properly be considered either a Rule 59(e) motion to alter or amend judgment or a Rule 60(b) motion for relief from judgment, Kelley's appeal from the denial of that motion may also be considered as a timely appeal from the underlying order granting Industrial's "unopposed" motion for summary judgment. *See Cobb v. Miller*, 818 F.2d 1227 (5th Cir.1987) (motion to alter or amend judgment under Rule 59(e) makes judgment nonfinal for purposes of appeal); Fed.R.App.P. 4(a) (timely motion under Rule 59(e) tolls the running of time for filing a notice of appeal).

whether the district court properly granted summary judgment in favor of Industrial on the issue of its liability as the seller of the Demere ice plant.[7] Because we answer that question in the affirmative, we need not address Industrial's argument on cross-appeal that the district court erred ingranting the new trial.

A.

In our review of the district court's grant of summary judgment, we examine the record *de novo. Walker v. Sears, Roebuck & Co.,* 853 F.2d 355, 358 (5th Cir.1988). Summary judgment is proper only if the record discloses that there is no genuine issue as to any material fact and that Industrial is entitled to judgment as a matter of law. FED. R.CIV.P. 56(c). In examining the record, we must view the evidence and all justifiable inferences drawn from that evidence in the light most favorable to Kelley. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2501, 2513-14, 91 L.Ed.2d 202 (1986); *Reid v. State Farm*

---

[7] Kelley also raises a number of issues regarding the manner in which the trial court should proceed in the event of a remand. Specifically, Kelley argues that we should instruct the trial court to exclude all evidence of victim fault and third-party liability. Kelley also contends that, on remand, she should be entitled to judgment as a matter of law on the issues of "strict seller liability" and "inadequacy of warning." As Kelley acknowledges in her brief, however, these issues are not "directly" presented by her appeal of the district court's grant of summary judgment or its denial of her motion to reconsider. Kelley has not appealed from the district court's denial of her motion for a judgment n.o.v., and that court's order granting the new trial has rendered harmless any error committed during the first trial. Kelley, in effect, asks this court to render an advisory opinion on these issues. Because we conclude that a remand for trial is not warranted, we clearly need not address these issues.

Mut. Auto Ins. Co., 784 F.2d 577, 578 (5th Cir.1986). If the record, viewed in this light, could not lead a rational trier of fact to find for Kelley, there is no genuine issue for trial, and summary judgment is proper. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 578, 106 S.Ct. 1348, 1351, 89 L.Ed.2d 538 (1986); *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir.1990). If, on the other hand, the factfinder could reasonably find in Kelley's favor, then summary judgment is improper. *Anderson*, 477 U.S. at 250, 106 S.Ct. at 2511; *Lavespere*, 910 F.2d at 178.

In the context of summary judgment, the rules governing burden of proof are critically important. *Lavespere*, 910 F.2d at 178. As the moving party, Industrial bears the initial burden of establishing that there are no genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986); *Lavespere*, 910 F.2d at 178. Industrial must sustain this burden by informing the court of the basis for its motion, and by identifying portions of the record which reveal that there are no genuine issues for trial. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552-53; *Lavespere*, 910 F.2d at 178. Once such a showing is made, however, the burden shifts to Kelley to set out specific facts in the record showing that a genuine issue exists. *Lavespere*, 910 F.2d at 178.

B.

[1-3] Under Louisiana law,[8] the manufacturer of a

[8] We note that Mr. Kelley's accident occurred prior to the effective date

defective product—that is, a product that is unreasonably dangerous to normal use—may be held strictly liable in tort for harm caused by the product. *See Halphen v. Johns-Manville Sales Corp.*, 484 So.2d 110, 113 (La.1986); *Bell v. Jet Wheel Blast*, 462 So.2d 166, 168 (La.1985); *Hebert* v. Brazzel, 403 So.2d 1242, 1244 (La.1981); *Weber v. Fidelity & Casualty Ins. Co.*, 259 La. 599, 250 So.2d 754 (1971). The non-manufacturer seller of a product, by contrast, generally may be held liable only for its negligent failure to warn consumers of the dangerous propensities of the product it sells. *See Hopper v. Crown*, 555 So.2d 46, 48 (La.Ct.App. 1st Cir. 1989) ("A non-manufacturer/seller in some instances has a duty to warn a purchaser of defects and/or dangerous propensities in the products he sells."), *rev'd on other grounds*, 558 So.2d 1117 (La.1990).[9]

(footnote 8 continued)
of the Louisiana Products Liability Act, La.Rev.Stat.Ann § 9:2800.51 *et seq.* (West 1991).

[9] There are, of course, exceptions to the general rule. For example, a non-manufacturer seller who holds a product out to the public as his own, or who qualifies as a "professional vendor," may be held to the same standard as a manufacturer. *See Chappuis v. Sears Roebuck & Co.*, 358 So.2d 926, 930 (La.1978); *Home Ins. Co. v. National Tea Co.*, 577 So.2d 65, 74 (La.Ct.App. 1st Cir.1990), *aff'd in part, rev'd in part on other grounds*, 588 So.2d 361 (La.1991); *Nelton v. Astro-Lounger Mfg. Co.*, 542 So.2d 128, 132 (La.Ct.App. 1st Cir.1989). Because Kelley does not seek recovery under either of these two theories, we need not concern ourselves with the details.

Kelley has argued, however, both at trial and before this court, that a non-manufacturer seller is subject to strict liability under § 402A of the Restatement (Second) of Torts. As the district court noted, however, Kelley has offered no Louisiana cases supporting her argument that strict products liability applies to non-manufacturer sellers. Moreover, Kelley's assertion at oral argument that the Louisiana Supreme Court's decision in *Bell v. Jet Wheel Blast*, 462 So.2d 166 (La.1985), supports her position is simply untenable. In that case, the Louisiana court addressed

[4-6] It is well-settled, for example, that the seller of a defective product may be liable in tort if he knew or should have known that the product was defective, and he failed to declare it. *Home Ins. Co. v. National Tea Co.*, 577 So.2d 65, 74 (La.Ct.App. 1st Cir. 1990), *aff'd in part, rev'd in part on other grounds*, 588 So.2d 361(La.1991); *Nelton v. Astro-Lounger Mfg. Co.*, 542 So.2d 128, 131 (La.Ct.App. 1st Cir.1989); *LeBleu v. Homelite Div. of Textron, Inc.*, 509 So.2d 563, 565 (La.Ct. App. 3rd Cir.1987); *Harris v. Atlanta Stove Works, Inc.*, 428 So.2d 1040, 1043 (La. Ct.App. 1st Cir.). *See also* LA.CIV.CODE ANN. art. 2545 (Liability of seller for concealment of vice). Moreover, even in the absence of a defect *per se*, some Louisiana courts have imposed upon the seller of a potentially dangerous product a duty to warn of the possible dangers involved in using that product. *Hopper*, 555 So.2d at 49; *American Ins. Co. v. Duo Fast Dixie, Inc.*, 367 So.2d 415, 417 (La.Ct.App. 4th Cir.1979); *Hoffoss v. Ralston Purina Co.*, 341 So.2d 605. 606 (La.Ct.App. 2nd Cir.1977); *Williams v. Allied Chemical*

---

footnote 9 continued.
a narrow question certified by this court; whether the defense of contributory negligence applied to strict products liability claims under Louisiana law. *Id*, at 168. And, while some of the language of the decision might be read to suggest that "suppliers" could be subject to strict liability, *see id.*, the court clearly did not purport to address the issue of strict "seller" liability. Indeed, in the wake of *Jet Wheel Blast*, Louisiana courts have consistently stated that sellers of defective products are accountable only for their negligent failure to warn. *See Home Ins.*, 577 So.2d at 74; *Nelton*, 542 So.2d at 131; *LeBleu v. Homelite Div. of Textron, Inc.*, 509 So.2d 563, 565 (La.Ct.App. 3rd Cir.1987). Finally, it is noteworthy that in enacting the Louisiana Products Liability Act, La.Rev. Stat Ann. § 9:2800.51 *et seq.*(West 1991), which became effective September 1, 1988, the Louisiana legislature imposed strict liability only upon manufacturers and those sellers that would have qualified as "professional vendors" under prior case law. *See id.* at § 2800.53(1)(b) (definition of manufacturer).

Corp., 270 So.2d 157, 160 (La.Ct.App. 1st Cir.1972). A seller is not required, however, to inspect a product prior to sale to determine the possibility of inherent vices or defects which are not apparent. *Home Ins.* 577 So.2d at 74; *Nelton*, 542 So.2d at 131; *Harris*, 428 So.2d at 1043. And, unlike the manufacturer, the seller is not presumed to have knowledge of a product's vices. *Hopper*, 555 So.2d at 48; *Martin v. Henderson*, 505 So.2d 192, 195 (La.Ct.App. 3rd Cir.1987); *see also Weber v. Fidelity & Casualty Ins. Co.*, 259 La. 599, 250 So.2d 754 (La.1971).[10] Furth rmore, Louisiana courts have consistently held that a seller's duty to warn goes only to those dangers which are not obvious—the seller has no duty to warn of dangers of which the user is or should be aware. *Delanzo v. ABC Corp.*, 572 So.2d 648, 651 (La.Ct.App. 5th Cir.1990); *Hopper*, 555 So.2d at 49; *American*, 367 So.2d at 417; *see also Halphen*, 484 So.2d at 155 (limiting the duty of a *manufacturer* to warn to dangers which are not within the knowledge of or obvious to the

---

[10] Industrial argues in its brief that it had no independent duty to warn of the dangers presented by the auger-equipped bin because the manufacturer, Price-Macemon, provided no warnings. According to Industrial, the failure of the manufacturer to provide sufficient warnings "serves to absolve" the seller of any liability for damages. Industrial cites *Delanzo v. ABC Corp.*, 572 So.2d 648, 651 (La.Ct. App. 5th Cir.1990) and *Elmwood Plantation, Inc. v. Ruud Water Heater Div.*, 435 So.2d 507 (La.Ct.App. 5th Cir.1983), in support of this proposition. In each of these cases, however, the court found that the seller had no independent duty to warn *because* there was no evidence that the seller knew or should have known of the defect that caused the injury. *See Delanzo*, 572 So.2d at 651; *Elmwood*, 435 So.2d at 512-13. If the manufacturers had furnished warnings, the sellers presumably would have had knowledge of the defect, or, at the very least, they would have been negligent in not forwarding the warnings to the consumer. Thus, these cases do not stand for the broad proposition asserted by Industrial. Rather, they merely apply the well-settled rule that a seller's duty to warn goes only to those defects or dangers of which it is or should be aware.

user); *Home Ins.*, 577 So.2d at 73-74 (same); *LeBleu*, 509 So.2d at 565 (same); *Ducote v. Liberty Mut. Ins. Co.*, 451 So.2d 1211, 1213 (La.Ct.App. 4th Cir. 1984) (same); *Lovell v. Earl Grissmer Co.*, 422 So.2d 1344, 1350 (La.Ct.App. 1st Cir. 1982) (same); *Thornhill v. Black, Sivalls & Bryson, Inc.*, 385 So.2d 336, 338 (La.Ct.App. 1st Cir.1980) (same), *aff'd*, 394 So.2d 1189 (La.1981).[11]

---

[11] We note that effective August 1, 1980, Louisiana adopted a pure comparative fault system of tort liability. *See* La.Civ.Code Ann. art. 2323 (West Supp.1993). The Louisiana Supreme Court, in response to a question certified by this court, has stated that the statute serves to eliminate "the inequities inherent in the 'all or nothing' recovery rules that prevailed prior to the adoption of comparative fault." *Murray v. Ramada Inns, Inc.*, 521 So.2d 1123, 1133 (La.1988). specifically, the Louisiana court held that the defenses of contributory negligence and assumptioin of the risk "shall no longer operate as a complete bar to recovery" in negligence or strict liability cases. *Id.* Thus, according to the Louisiana Supreme Court, the "net effect of article 2323, as amended, is to prevent courts from applying any defense more injurious to a damage claim than comparative negligence." *Bell v. Jet Wheel Blast*, 462 So.2d 166, 170 (La.1985). The *Murray* court also expressly rejected the argument that the defendant "had *no duty* to protect the decedent from a danger of which he had knowledge" as an attempt to "inject" the assumption of the risk doctrine into the analysis "through the back door." 521 So.2d at 1136 (emphasis in original). Although the tension between Louisiana's new pure comparative fault system and the "obvious danger rule" is clear, to date, no Louisiana court has directly addressed the issue. Indeed, in cases decided after the effective date of article 2323, Louisiana courts have continued to recite the rule without comment. *See Delanzo*, 572 So.2d at 651; *Hopper*, 555 So.2d at 49; *see also Halphen*, 484 So.2d at 155 (limiting the duty of a *manufacturer* to warn to dangers which are not within the knowledge of or obvious to the user); *Home Ins.*, 577 So.2d at 73-74 (same); *LeBleu*, 509 So.2d at 565 (same); *Ducote*, 451 So.2d at 1213 (same); *Lovell v. Earl Grissmer Co.*, 422 So.2d at 1350 (same). In, *Hopper*, the only case actually decided on the issue of the obviousness of the danger, the Louisiana Supreme Court reversed without reasons. *See Hopper v. Crown*, 558 So.2d 1117 (La. 1990). In a concurring opinion, however, one Justice stated in dicta that "the seller might still prevail if the defect was obvious to the ordinary user." *Id.* (Lemmon, J., concurring). In light of the fact that the courts of

(7,8) In the case before us, Industrial moved for summary judgment on the issue of its liability as the seller of the auger-equipped ice bin on the grounds that it had no knowledge of any defect or dangerous condition prior to Jack Kelley's accident and, alternatively, that it had no duty to warn of an obvious danger. In support of its first argument, Industrial offered the affidavit of David McGowan, Industrial's president, in which he states that "[Industrial] had no knowledge of any alleged defects in any of the equipment, and [Industrial] was never aware of any alleged dangerous or unsafe condition in the equipment at any time prior to the accident involving Mr. Kelley." Industrial also offered excerpts from McGowan's trial testimony[12] in which he testified that he had no knowledge of any specific defect in the ice-storage bin. Specifically, he stated that he was not aware of the need for certain safety

---

(footnote 11 continued)

Louisiana clearly have not rejected the obvious danger rule as inconsistent with comparative fault, and the fact that Kelley has not raised the issue, we need not decide how we think the Louisiana Supreme Court would resolve the issue if it were directly presented.

[12] In the usual case, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits submitted by the parties in support or in opposition to the motion constitute the summary judgment record. *See* Fed.R.Civ.P. 56(c). In the instant case, however, the district court, in adjudicating Industrial's motion for summary judgment, primarily relied upon the testimony offered at the prior trial. Although Rule 56 does not expressly contemplate the use of such evidence in granting summary judgment, we find no error in relying upon such evidence. It is well-settled that a certified transcript of a judicial proceeding may be considered on a motion for summary judgment. *See Langston v. Johnson*, 478 F.2d 915, 918 (D.C.Cir. 1973) (citing cases); *see also Randolph v. Laeisz*, 896 F.2d 964, 970 (5th Cir. 1990) (considering—without discussion—the testimony given during the trial of the main action on a motion for summary judgment in a servered

equipment and warning decals until after the accident.[13]

As Kelley pointed out in her response, however, McGowan's own testimony belies his assertion that he was not aware of "any allegedly dangerous or unsafe condition" in the auger-equipped bin prior to Jack Kelley's death. McGowan testified that he entered the bin on one occasion, along with Damas Demare, David Easley, and two others, for the purpose of "testing the movement of the augers and things like that" and that, while he was in the bin, he saw the auger "eat" a metal shoval. Demere described the incident as follows:

> [W]e had got into [the bin] to observe [the auger] running. There were some problems with the gearbox, problems with the sweep, and after we came out of that machine we expressed to anyone who would lend an ear 'Do not get in the manchine.' It's potentially lethal, We had seen what it would do that day. I believe David Easley was holding a shovel, and [the auger] pulled it out of his hand, and, you know, it was a revelation for us."

(footnote 12 continued)

action); *Downes v. Beach*, 587 F.2d 469, 471-72 (10th Cir. 1978) (holding that the record of the prior proceeding was properly considered on a motion for summary judgment after a new trial was granted). In the present case, a certified transcript of the prior trial was made part of the record.

[13] On October 29, 1987, nearly five months after Jack Kelley's fatal accident, Industrial received from Price-Macemon, the manufacturer of the ice bin and auger, a package containing interlock or "deadman" switches, warning decals, and instructions regarding the installation of the switches and the placement of the decals.

David Easley's version of the "shovel-eating" incident differs somewhat from Demere's, but the impact of the incident is no less apparent:

> Q. Were you—were you at the demonstration where Mr. McGowan and Mr. Oline were where the auger caught a shovel?
>
> A. Yeah, I'm the one who threw it in there.
>
> Q. You threw it in there. And why did you throw it in there?
>
> A. As a good demonstration.
>
> Q. And so it would chop it up and eat it up?
>
> A. It mutilated it.
>
> Q. And after it mutilated it[...] did this occur before Jack Kelley was killed?
>
> A. Yes.
>
> Q. And what steps did you take to see to it that the workers who worked in that area would work in a safe environment after that?
>
> A. I told everybody that would listen, as I testified earlier, that this was—this was a piece of equipment that could kill you.
>
> Q. And that's it?
>
> A. I don't know what else I could have done.

. . . . .

Q. Did you tell McGowan that?

A. McGowan saw it.

Based on what he saw that day in the ice bin, McGowan testified: "I think it was quite obvious that the equipment is dangerous." We agree with the district court that this testimony precludes summary judgment in favor of Industrial on the issue of its knowledge of the dangerous condition presented by the auger-equipped bin.

[9] The second theory offered in support of Industrial's summary judgment motion was that the auger-equipped bin presented a danger that was so obvious that Industrial had no duty to warn. As noted, *supra*, a seller's duty to warn goes only to those dangers which are not obvious—the seller had no duty to warn of dangers of which the user is or should be aware. *Hopper,* 555 So.2d at 49; American, 367 So.2d at 417. Insupport of this theory, Industrial primarily relied upon the teatimony of Damas Demere. According to Industrial, Demere testified that he was well aware of the danger posed by the auger, that everyone knew the auger could kill, and that he had warned all of the ice-plant employees, including Jack Kelley, to stay out of the bin. Indeed, according to Industrial, Demere told Kelley that he was not even to get on the platform on which the bin was situated. Industrial also stated generally that "Delton Demere, Steve Fillimich, David Easley, and David McGowan all testified that the potential danger of the auger was obvious." In granting summary judgment, the district court concluded that the testimony of these witnesses established that the auger in which Kelley had become entangled presented an obvious danger. After a careful review of the trial transcript, we agree,

for, even when we view the testimony, as we must, in the light most favorable to Kelley, we conclude that it could not lead a rational trier of fact to find in favor of Kelley on the issue of the auger's obvious danger.

As Industrial pointed out in its motion for summary judgment, Damas Demere, David Easley, and David McGowan each testified that he knew the auger-equipped ice bin was a very dangerous piece of equipment. This acute sense of dangerousness arose, at least in part,[14] from the shared experience of being inside the bin and watching the auger mutilate a metal shovel. According to Damas Demere, once they "had seen what it could do" they knew that the auger was "potentially lethal."

Delton Demere, on the other hand, did not witness the "shovel-eating" incident and, apparently, never had been inside the bin. Not surprisingly, Delton was not as adamant about the dangerousness of auger-equipped bin as were Damas, Easley, and McGowan. He conceded on cross-examination, however, that he had in a deposition that "[n]obody would have had any business being in that ice machine." He also testified that he thought Jack Kelley had been in the bin prior to the day of his accident.

Steve Fillimich, Jack Kelley's co-worker and the only ice-plant employee who testified, explained the problem

---

[14] Of course, as the seller and installer of the ice-bin, McGowan and Easley also possessed knowledge about the product that an ordinary user would not have, and, at least arguably, a certain self-interest. *See Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 564 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215, 104 S.Ct. 2658, 81 L.Ed.2d 364 (1984) (self-serving testimony is subject to especially searching scrutiny).

with the ice plant: "When the ice would settle at the bottom, if for a few days, it was hard to break. The auger would just eat in certain part, the top would not come down. It would just eat, and the ice would stay on top, so you had to go in there with a pick and break it, or a shovel." Fillimich testified that the only way to get the ice out of the bin was to go into the bin with the auger running, chop the ice, and feed it into the auger. He testified further that he had gone into the bin on at least two occasions to break up ice—he "figured" it "was part of his job"—and that other employees, including Jack Kelley, also had gone into the bin to chop ice, with the auger running, prior to the day of the accident.

Fillimich also stated that he knew that the auger, which swept the floor of the bin, presented a danger:

> Q. Okay. Now, when you were in there shoveling the ice, you knew you had to stay clear of that auger, didn't you?
>
> A. Yeah, common sense.
>
> Q. Common sense?
>
> A. Right.
>
> Q. Because you knew if you didn't stay clear of that auger what would happen?
>
> A. Very Dangerous.
>
> Q. Okay, Nobody needed to tell you that, did they?
>
> A. No.

According to Fillimich, he stayed clear of the auger by staying in front it, shoveling the ice, and moving back, always careful to watch the auger and keep his feet and shovel "clear."

Fillimich recounted that on the morning of the accident, he had turned on the delivery system, climbed into the ice bin, and started chopping ice. When Jack Kelley arrived for work that morning, Fillimich testified, "he took the shovel and he want in and I came out." According to Fillimich, he then went out to "run the ice into a truck." Precisely what happened inside the bin remains a mystery.

While it is not clear from the record that anyone ever told Jack Kelley to stay out of the auger-equipped bin,[15] the uncontroverted testimony of Fillimich and Delton Demere established that Jack Kelley had been in that bin, chopping ice and feeding it into the auger, prior to the day he was tragically killed. Thus, on the morning of July 5, 1987, when Jack Kelley climbed through the small service door on the ice bin, he knew what was inside. And, while he had not witnessed the shovel-eating incident as had Damas Demere, Easley, and McGowan, he nonetheless "had seen what it could do."

---

[15] Both Damas Demere and David Easley testified that they had told "everybody who would listen" to stay out of the ice bin. Easley, after some equivocation, testified that he was "sure" he told Kelley. Demere testified that "Jack [Kelley] was present more than once when I told several people never to go inside that storage bin," that it was his "policy" that no employees were to go into the bin, and that he told Jack Kelley that he would be fired if he got "on the slab" again. Yet Demere also testified that, prior to Kelley's accident, he was not "aware" that employees were going into the bin and that "there was no set policy as far as saying don't get in." He also admitted that his warning to Kelley

[10] The question of whether Jack Kelley actually knew of the danger presented by the auger-equipped bin is, of course, a question of fact. Similarly, under Louisiana law, the question of whether the danger presented by the auger-equipped bin was obvious—that is, whether it presented a danger that should have been known to Jack Kelley under the circumstances is also primarily a question of fact. *Owens v. New Orleans Maintenance, Inc.*, 349 So.2d 494, 500 (La.Ct.App. 4th Cir. 1977). Nevertheless, in light of the uncontroverted evidence that those who observed the auger in operation were aware of its potential danger, that Kelley had been in the ice bin before, with the auger running, and that the auger was running when Kelley climbed into the bin on July 5, 1987, we must conclude that the record before us, even when viewed in the light most favorable to Kelley, could not lead a rational trier of fact to find that Jack Kelley should not be charged with knowledge of the auger's dangerousness. Under these circumstances, an ordinary user should have recognized the danger. *See Melton v. Deere & Co.*, 887 F.2d 1241, 1244 (5th Cir. 1989) (affirming a judgment n.o.v. and stating that "the risk that an auger may be engaged whenever the engine is running is a matter of common sense with which the a reasonable user of the combine must be charged"); *Gray v. Manitowac Co.*, 771 F.2d F.2d 866, 871 (5th Cir. 1985) (reversing and rendering judgment in favor of a

---

(footnote 15 continued)

regarding getting on the "slab" had nothing to do with going inside the bin, but arose from his concern that Kelley would again break a piece of machinery on the underside of the bin. According to Fillimich, he was never told that he should not go into the bin to break up the ice. Moreover, he testified that he never told Jack Kelley not to go into the bin and that, to his knowledge, no one else had ever told Kelley to stay out. This testimony, at best, creates a fact issue.

manufacturer on grounds that a reasonable jury could not have found that a danger was not open and obvious). Thus, because the record before us does not disclose a genuine issue of fact regarding the obvious nature of the danger that lay inside the ice bin, we find that the district court properly granted summary judgment in favor of Industrial on the issue of its liability as the seller of the Demere ice plant.

III.

In sum, we conclude that the record before us supports the district court's conclusion that the auger in which Jack Kelley became entangled on July 5, 1987, presented an obvious danger—that is, it presented a danger of which Kelley should have been aware. Thus, under Louisiana law, Industrial had no duty to warn of that danger. Because Industrial's tort liability as the *seller* of the ice-plant must arise, if at all, from its failure to warn of this dangerous condition, Industrial is entitled to judgment as matter of law. Accordingly, we AFFIRM the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed
JUL 29 1993

No. 92-3511

CYNTHIA ANN KELLEY, Individually and on Behalf of Her Minor Children Jerred Seth Kelley and Cindy Lynn Kelley,
Plaintiff-Appellant,
Cross-Appellee,

versus

PRICE-MACEMON, INC., ET AL.,
Defendants,

INDUSTRIAL REFRIGERATED SYSTEMS, INC.,
Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana

---

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion 06/15/93, 5 Cir., ____, ____ F.2d ____)

(July 29, 1993)

Before KING and EMILLO M. GARZA, Circuit Judges, and COBB*, District Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King

United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

RICHARD E. WINDHORST, JR.
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

June 29, 1993

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

NO. 92-3511 - KELLEY vs PRICE-MACEMON, INC., ET AL.

(D.C. No. CA-88-2862-K)

The following action has been taken in the above case:

(X) AN EXTENSION OF TIME has been granted to and including

* JULY 9, 1993

( ) for filing appellant's/petitioner's brief.

( ) for filing appellee's/respondent's brief.

( ) for filing reply brief.

(X) for filing petition for rehearing.

---

* Must be physically filed in this office by due date.

( ) Motion to consolidate granted.

( ) Motion to supplement or correct the record granted.

( ) Motion for leave to file supplemental brief granted.

( ) Motion for leave to file brief *amicus curiae* is granted.

( ) Joint motion as to time for filing briefs granted.

( ) Order enclosed has been entered.

RICHARD E. WINDHORST, JR., Clerk

BY: /s/ Linda Vaughs
Deputy Clerk

cc: Mr Henry L. Klein
Mr. Claude D. Vasser

LAW OFFICES
HEISLER & WYSOCKI
844 BARONNE STREET
NEW ORLEANS, LOUISIANA 70113-1103
TELEPHONE: (504) 586-9971
TELECOPIER/FAX: (504) 586-9715
FEDERICK P. HEISLER JAMES A WYSOCKI
(1938-1989)

OF COUNSEL:
CYRIL J. GRACIANETTE
HENRY L. KLEIN

JULY 9, 1993

FILED
JUL 8 1992

U.S. Court of Appeals
Fifth Circuit
600 Camp Street
New Orleans, LA 70130

Attention: Richard Windhorst

RE: **Kelley v. Industrial, No. 92-3511, United States Court of Appeal, Fifth Circuit**

Dear Mr. Windhorst:

This confirms my conversation of this date with your staff regarding the filing of (a) appellant's application for

rehearing and (b) appellant's suggestion for en banc rehearing, both of which were to be simultaneously filed this date.

It is understood that appellant has been granted an extension for filing her application for rehearing and suggestion for en banc rehearing until and including July 14, 1993.

As requested, I am writing this letter to confirm this extension.

With kind regards, I remain

Very truly yours,

/s/ Henry L. Klein
HENRY L. KLEIN

HLK/el

cc: Claude Vasser, Esq.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Filed
JUL 14 1993

No. 92-3511

CYNTHIA KELLEY, individually
and on behalf of her minor children
Jerred Seth Kelley and Cindy Lynn Kelley
Plaintiff-Appellant

VERSUS

INDUSTRIAL REFRIGERATED SYSTEMS, INC.,
Defendant-Appellee

Appeal from the United States District Court
Eastern District of Louisiana
No. 88-2862, Section "K"
Honorable George Arceneaux, Jr., Judge Presiding

PETITION FOR PANEL REHEARING ON BEHALF OF APPELLANT
Cynthia Kelley, individually
and on behalf of her minor children
Jerred Seth Kelley and Cindy Lynn Kelley

SUBMITTED BY:

HENRY L. KLEIN, ESQ. (#7440)
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971
Attorney for Cynthia Kelley

OF COUNSEL:
HEISLER & WYSOCKI

SUMMARY OF ARGUMENT ON PANEL REHEARING

1. INDUSTRIAL DID *NOT* INCLUDE "OBVIOUS DANGER" AS AN ISSUE AS TO WHICH THERE WAS NO MATERIAL FACT, IN CONFORMITY WITH LOCAL RULE 2.09, AND THEREFORE DID NOT MEET ITS THRESHOLD BURDEN UNDER *CELOTEX CORP. V. CATRETT*, 477 U.S. 317, 325, 106 S.CT. 2548, 2553-54, 91 L.ED.2D 265 (1986).

2. EVIDENCE WEIGHING "HEAVILY AGAINST" DEFENDANT'S CONTENTIONS REGARDING "OBVIOUS DANGER" INCLUDED: (a) THE PHOTOGRAPH OF THE AUGER WHEN THE ICE LEVEL WAS LOW; (b) THE SPEED OF THE AUGER IN MAKING ITS 360° SWEEP OF THE BIN FLOOR; (c) KELLEY'S *NOT HAVING* SEEN THE SHOVEL-EATING INCIDENT; (d) THE SCARCITY AND LACK OF CLARITY OF EVIDENCE REGARDING KELLEY'S PRIOR ENTRY INTO THE BIN; AND (e) EVIDENCE THAT OTHERS DID NOT CONSIDER THE EQUIPMENT DANGEROUS.

3. PLAINTIFF DID RELY ON THE " PROFESSIONAL VENDOR" RULE. THE ISSUE WAS SPECIFICALLY RAISED AT LEAST 8 TIMES: (a) IN OUR PRE-TRIAL MEMORANDUM; (b) IN OUR CROSS-EXAMINATION OF DAVID McGOWAN; (c) IN OUR CROSS-EXAMINATION OF DAVID EASLEY; (d) IN OUR CROSS-EXAMINATION OF LAWRENCE OLINDE; (e) IN OUR JURY CHARGES; (f) IN OUR MOTION FOR JUDGMENT N.O.V.; (g) IN OUR ORIGINAL BRIEF TO

THIS COURT; AND (h) IN OUR REPLY BRIEF.

4. THE AFFIDAVIT FILED IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT WAS DIAMETRICALLY OPPOSED TO THE "OBVIOUS DANGER" ISSUE, WHICH WAS *NOT* INCLUDED IN THE STATEMENT OF UNCONTESTED FACTS.

5. BECAUSE McGOWAN SAW THE WARNING DECALS AT THE SHOVEL-EATING DEMONSTRATION, INDUSTRIAL WAS ADDITIONALLY NEGLIGENT FOR FAILURE TO REQUIRE THE LABELS TO BE PLACED NEAR THE ACCESS DOOR.

6. INDUSTRIAL'S LIABILITY AS A SELLER INCLUDED ITS FAILURE TO SUPPLY INTERLOCKS, DEADMAN CONTROLS AND EMERGENCY STOP DEVICES; THIS LIABILITY IS INDEPENDENT OF FAILURE TO WARN.

7. MATTERS WHICH ARE INTERLOCTUTORY IN NATURE ARE "MERGED" INTO THE FINAL JUDGMENT AND ARE REVIEWABLE UPON APPEAL OF THE FINAL JUDGMENT. ACCORDINGLY, THIS COURT'S SCOPE OF REVIEW IS NOT LIMITED TO JUST THE SUMMARY JUDGMENT.

8. "THE FEDERAL RULES REJECT THE APPROACH THAT PLEADING IS A GAME OF SKILL IN WHICH ONE MISSTEP BY COUNSEL MAY BE DECISIVE TO THE OUTCOME..." *CONLEY V. GIBSON,* 78 S.CT. 99, 103; 355 U.S. 41, 48. WE MADE ONE SUCH MISSTEP. IT APPEARS THAT MRS. KELLEY'S SUBSTANTIVE RIGHTS MAY HAVE BEEN AFFECTED AND WE RESPECTFULLY ASK FOR RECONSIDERATION.

PETITION FOR PANEL REHEARING

Cynthia Kelley respectfully petitions the panel of this Court for a panel rehearing on the following grounds:

Industrial's Threshold Burden/Local Rule 2.09. Industrial's motion did not sustain its threshold burden regarding the "open and obvious" issue, as required by *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986) and *Lavespere v. Niagara Mach. & Tool Works, Inc.* 910 F.2d 167, 178 (5th Cir. 1990), *inter alia.* It is fundamental that unless the mover sustains its *initial* burden, the motion cannot be granted, whether opposed or unopposed. The foundation for any motion for summary judgment begins with the "Statement of Uncontested Material Facts." Local Rule 2.09 provides as follows:

> "2.09 ***Motions for Summary Judgment*** Every motion for summary judgment *shall* be accompanied by a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried."

Since this panel has ruled that there was no issue of fact regarding the obvious nature of the danger, it was mandatory for Industrial to have made such a statement in connection with its motion. Otherwise, the issue is not raised, *ab initio.* Here, Industrial *did not comply with Rule 2.09* and did not state, as an uncontested material fact that the danger was "obvious." In our original brief, we clearly raised the issue of Industrial's incomplete "Statement of Uncontested Facts"[1]. For the court's convenience, we restate

---

[1] *Original brief,* pp. 37, *et seq.*

Industrial's 2.09 certification, and beg the Court to recognize that Industrial did *not* contend that the issue of "open and obvious danger" was uncontested (001673):

> ***"STATEMENT OF UNCONTESTED FACTS***
>
> I.
>
> The accident which forms the basis of this suit occurred on July 5, 1987.
>
> II.
>
> The accident occurred in an ice storage bin manufactured by Price-Macemon/Rochester Silo.
>
> III.
>
> The ice storage bin was not manufactured by Industrial Refrigerated Systems, Inc. Instead, Industrial Refrigerated Systems, Inc. acted only as the retail seller of the ice storage bin."

As the Court can see, *no* statement is made to the effect that the danger was "open and obvious". That issue, therefore, was *never* before the District Court or before this Court, which views the granting of a summary judgment *de novo*. We cannot be required to respond to an issue not properly raised.[2].

Although we have worked very hard to represent the

---

[2] Actually, Industrial's supporting affidavit suggests *the opposite*. McGowan's assertion was that "...IRS was never aware of any alleged dangerous or unsafe condition..." See point 4, *infra*.

interests of Jack Kelley's widow and children, we received harsh treatment[3] because we failed to meet the letter of the Local Rules regarding the filing of our opposition. Might we ask this Court to apply Rule 2.09 to the case at bar? Putting the issues clearly before the Court, and the opposing party, is not only a matter mandated by the Local Rules, but is the law of the land. *Celotex, supra.*

2. "Obvious Danger." Notwithstanding the fact that Industrial did not make "obvious danger" an issue of uncontested material fact, as set forth above, this Court has decided that the danger of entanglement was so "obvious" and that the evidence was so "uncontroverted" that summary judgment was proper on this issue.

It is apparent that the shovel-eating incident played a leading role in the Court's decision. With all due respect, however, there was a *substantial* difference between the auger's appearance at the "shovel-eating" demonstration and the auger's appearance when it was covered with 18 inches of ice.

For this very reason, we gave the Court, during our oral argument, a copy of the photograph which had been presented to the District Court during trial, and which the District Court relied upon in granting a new trial. At 001779 (Excerpt 17), the District Court made the following finding, which we respectfully submit was correct:

---

[3] Although the District Court stated that it considered the motion on its merits, a major part of the Court's Memorandum Opinion of May 25, 1992 was devoted to excoriating plaintiff's counsel. We don't believe Mrs. Kelley's rights were objectively considered.

"The weight of the evidence did support the fact that other persons routinely entered the ice machine to assist in ice-making operations; *other evidence placed in dispute the decedent's knowledge of the allegedly obvious danger.* More importantly, the court has viewed a photograph submitted to it during the trial, which plaintiff's counsel failed to include in the pre-trial order and never offered into evidence (Record 248), *which weighs heavily against defendant's contentions regarding the obvious danger posed by the ice machine.*"

When the subject motion was filed in April of 1992, this photograph, *together with all of the evidence which had already been adduced at trial,* was before the District Court. At the risk of losing a valuable page of our limited length on rehearing, we reproduce herein the picture of how the danger was hidden:

In reaching its decision, this panel has given great consideration to the evidence regarding the danger of the auger when the bin was empty, i.e. to the shovel-eating incident. The auger, however, gave a different appearance when the bin had ice. This difference was significant and created, at the very least, an issue of fact. But there was more than just the photograph:

2(a) The Level of the Ice when Kelley was Killed. Consistent with the appearance of the photograph at page 4 of this petition, Steve Fillimich testified that *on the day of the accident,* the ice level was "Low. About 18 inches." (Vol. 8, p. 44) He also testified that the shovelling process had to take place while the auger was on, otherwise, "You wouldn't accomplish nothing" (p.45). The testimony of Fillimich regarding the level of the ice, coupled with the photograph, does indeed "weigh heavily against the defendant's contentions regarding the obvious danger posed by the ice machine," as the District Court observed in granting a new trial.

2(b) The Speed of the Auger. The speed with which the auger circled the bin would also mask the hidden danger of the auger. Damas Demere, in describing how the entire ice plant was *not functioning properly,* testified about the speed of the auger, at page 75, line 13:

> "And basically the two screws are unstoppable as far as for rotating, but they would not sweep the room. *Every 20 minutes it's supposed to make a total, 360 degree lap of that room.* When the ice got hard, it simply would not advance, and the gear to do that with, to advance it, was outside the building. and you could

> put a wrench on it, and you put a little body weight on it, you could make it sweep into the ice. But the machine alone wasn't capable of doing it."

Thus, the auger was sweeping the bin at a speed *slower* than 20 minutes per each 360 degrees. By the mere fact that the auger needed assistance, it is obvious that the auger was moving slowly, a fact that would dictate against the defendant's claim of open and obvious danger.

2(c) "...had seen what it could do." At page 4652 of this Court's decision, it is said (with quotation marks) that Jack Kelley "...had seen what it could do," apparently (?) referring to the shovel-eating incident. We have reviewed the testimony and cannot find any witness making such a statement, which would have been inadmissible conjecture. The Court's Opinion makes no reference by footnote or otherwise to the record or to the testimony quoted. Nor can we find any evidence in the record to support this Court's conclusion that when Kelley climbed into the ice bin "...he knew what was inside." Since he wasn't at the demonstration, he certainly had not "seen what it could do" to a shovel!

Apparently, this Court believes that Jack Kelley *purposefully* subjected himself to the mercy of a "man-eater" (as Judge Cobb described it) without regard for his own safety. The testimony at trial, however, established that Jack Kelley was a diligent worker, trying to do his job, and no more[4]. The testimony also established that many other employees of Delton's One Stop had to do the same, and none were prohibited from shoveling ice[5].

---

[4] *Delton Demere,* at 92; *Fillimich,* at 66; *Wayland Demere,* at 109.

[5] *Fillimich,* at 36; *Delton Dewmere,* at 92; *Wayland Demere,* at 109.

Perhaps our point is better made by asking the question: Why in the world would these other men enter the bin to shovel ice into the auger if it was so obviously dangerous? Certainly, one reasonable *inference* would be that the danger was *not* "obvious." This Court must review the evidence, "...as well as the inferences that may be drawn from the evidence, in the light most favorable to the party that opposed the motion for summary judgment." *Little v. Liquid Air,* 952 F.2d 841 (5th Cir. 1992), and authorities cited.

2(d) Scant Evidence Regarding Kelley's Prior Actions. There was no evidence that Kelley had ever been in the bin *except when the auger was covered or partly covered with ice* as shown in the photograph presented to the Court. But even the evidence that he had *ever* gone inside the bin before his accident was scant and undeveloped. In support of a decision affirming summary judgment, this Court stated, at 4652, that:

> "...the uncontroverted testimony of Fillimich and Delton Demere *establishes* that Jack Kelley had been in that bin, chopping ice and feeding it into the auger prior to the day he was tragically killed."

Our review of the testimony, however, indicates that Delton Demere was equivocal, and hardly gave the type of testimony of which summary judgments are made, at Vol. 8, page 91, line 21:

> "Q. Do you know whether or not Jack *actually* had been into the bin to chop up ice on a date prior (to) the time he was killed? Do you

know if that was his first time that he was doing it or —

A. I *think* he had been there before, yes, sir."

As for Fillimich, the issue was equally undeveloped and, at best, placed Kelley in a position to see what is depicted in the photograph at page 4 of this brief, at Vol. 8, page 37:

"Q. Okay. Do you know for a fact whether or not Jack Kelley ever went into that silo before the day that he was killed?

A. I couldn't — lots of times we worked in shifts. He *might* have gone before.

Q. I know. Do you know whether or not he actually went into the silo before he was killed?

A. He went before."

There was no further development, on cross-examination, to amplify on this issue. This testimony certainly does not have the clarity required as a foundation for summary judgment. But even if it is accepted that Kelley had shoveled ice before, the only conclusion that can safely be made is that he saw an auger covered or partly covered with ice!

2(e) Other Evidence Weighing Against a Finding of "Obvious Danger." the District Court was also correct in stating that "other evidence placed in dispute the de-

cedent's knowledge of the alleged obvious danger", *supra*.

At page 274, Vol. 10 of the Trial Record, Lawrence Olinde, the sales representative for Industrial Refrigerated Systems, Inc. testified that, when making his sales pitch, he didn't think he was dealing with a dangerous piece of equipment. The only thing that changed his mind was Kelley's death, beginning at line 15:

"A. *I didn't think it was a dangerous piece of equipment.*

Q. Today as we speak, do you think it's a dangerous piece of equipment?

A. I would think so.

Q. And you didn't know it then?

A. *No, sir.*

Q. And why do you know it now?

A. Because someone got killed in it."

At page 184, Vol. 10, Damas Demere testified that Jack Kelley had been at the seafood company until just 3 or 4 weeks prior to his accident, when he moved to Delton's One Stop. At page 186, Demere confirmed that Kelley received "no training." Finally, at page 203, Demere described how the bin was not easily accessible.

As the Court knows, a worker was required to climb through a small opening in order to enter the bin. Whatever

danger lurked inside that bin was certainly not "open." Indeed, the defendant made a great effort to illustrate how *inaccessible* the auger was. At page 52 of the cross-examination of Steve Fillimich, for example, the following colloguy took place:

"Q. There was no steps or anything —
A. No.
Q. —to allow you to climb up to this hatch?
A. No.
Q. And you had to get a stool because you couldn't reach it otherwise; is that right?
A. Right, right.
Q. Well, whose idea was it to begin with to get a stool?
A. Well, we had one there. The only way, you have to jump to get to it.
Q. Yes. Do you know who put the stool there?
A. I probably put it myself.
Q. Do you know where you got it?
A. Somewhere around the store."

The truth of the matter is that Kelley, as many others, was not aware of the danger. Nor was the danger obvious when the plant began producing ice. These were all, at the very least, questions of fact. In *Little v. Liquid Air,, supra,* this Court held, at 847, that "Summary Judgment is rarely appropriate in negligence and products' liability cases, *even if the material facts are not in dispute.*" We respectfully submit that the issue of *Jack Kelley's knowledge* was a fact issue. and because so many others did the same, the "obvious" nature of the danger, *hidden by 18 inches of ice,* was particularly insusceptible of summary judgment.

3. "Professional Vendor." This Court found that Industrial's liability was limited to a duty to warn, which duty was absolved because the danger was obvious. As the Court noted at Footnote 9, such a rule does not apply to a "professional vendor." This is correct. We respectfully submit that the court erred, however, in concluding that "...Because Kelley does not seek recovery under either of these two theories, we need not concern ourselves with the details."

We *did* rely on the "professional vendor" doctrine. Indeed, Industrial *was* in the "business" of selling ice plants and we often made the point. Testimony was adduced to show that Industrial was a "professional vendor"[6], and we often emphasized that Industrial's letterhead described the company as:

"AMMONIA & FREON
REFRIGERATION SPECIALISTS."

In our pre-trial memorandum, Excerpt 11, we specifically relied upon the law applicable to "professional sellers", stating, at 001338[7]:

---

[6] *David Easley,* at 346, *et seq; David McGowan,* at 304 *et seq; Lawrence Olinde,* at 265 *et seq.*

[7] See also, pre-trial memorandum, at 001336, where we urged that Industrial was liable as a "supplier," thus:

> "The existing law was most thoroughly contained in the Supreme Court decision of *Halphen v. Johns Manville Sales Corp.,* 484 So.2d 110, which held, at 1114, that:
>
> 'A manufacturer *or supplier* who sells a product with a construction or composition flaw, is subject to liability *without proof that there was any negligence on its part in creating or failing to discover the flaw.*' "

> "Thus, if INDUSTRIAL *was engaged in the business of selling 'refrigeration systems'*, and if the system sold was 'unreasonably dangerous', and remained substantially unchanged from sale to injury, INDUSTRIAL is liable as a "seller," notwithstanding its separate liability as a 'manufacturer'."

It was specifically with the "professional vendor" issue in mind that we conducted the following cross-examination of David McGowan, Vol. 7, at page 31:

> "Q. You were, were you not, in the business of selling refrigerated systems?
>
> A. Equipment, yes.
>
> Q. You were in the business of selling ice plants or selling the equipment that's necessary to put together an ice plant?
>
> A. I sold equipment, yes.
>
> Q. Well, you were selling equipment related to the refrigeration and ice business?
>
> A. Yes.
>
> Q. That's what you did for a living?
>
> A. That's right. But I didn't put them together[8].

---

[8] The reason was that Industrial did not have a Louisiana contractor's license. McGowan testimony, Vol. 7, at 9.

"Q. I asked you whether you were in the business of selling refrigeration and ice equipment.

A. That is correct.

Q. Refrigeration and ice equipment that is necessary to put into an ice plant?

A. That's correct.

Q. Part of the component parts?

A. That's right."

In our jury charges, we submitted a specific jury charge on the issue. For the Court's convenience, our jury charges are included as Appendix "A" to our Reply Brief. Jury Charge No. 1 Specifically refers to a seller "...engaged in the business of selling ice plants..."

In our Motion for Judgment N.O.V., we again specifically relied on liability vested upon "professional vendors", stating at 001155 (Excerpt 15):

> "As the Court will surely recall, our Motion for a Directed Verdict was not 'wasted' on manufacturer liability, where there *was* conflicting evidence, but was *genuinely* made as to seller liability, where no reasonable men could differ with the proposition (a) that INDUSTRIAL was a 'seller', (b) ***that INDUSTRIAL was in the 'business' of selling ice plants and their components,*** (c) that this plant (or the auger/bin component thereof) was defectively designed and /or unreasonably dangerous and (d) that Jack Kelly was killed by the product sold."

In our original brief to this Court, we made specific reference, at page 8, to the fact that Industrial held itself out to be "Refrigeration Specialists", and we detailed, at footnotes 4 through 11, the testimony of various witnesses regarding the "sales pitch" made to the unsophisticated Demere family.

In our reply brief to this Court, at page 1, we specifically challenged Industrial's statement that they were not a 'professional vendor" by making reference to the testimony of seven witnesses: Scotty Chabert, Joey Adams, Delton Demere, Wayland Demere, Damas Demere, Lawrence Olinde and Dave McGowan.

Obviously, *we did rely upon a theory of liability on the part of Industrial as a "professional vendor"* and this Court's conclusion to the contrary is in error. It is respectfully submitted that the factual issues regarding Industrial's status as a "professional vendor" precluded summary judgment, that Industrial was "in the business" of selling refrigerated systems, and that Industrial is therefore subject to liability as a "professional vendor".

4. McGowan's Affidavit: Inconsistent with "obvious danger" Finding. In motions for summary judgment, the most important pleading is the statement of uncontested facts. After that come the affidavits submitted in support of such a motion. Here, Industrial submitted the affidavit of David McGowan, which *denied awareness* of "...any alleged dangerous or unsafe condition in the equipment at any time prior to the accident involving Mr. Kelley." This assertion, may it please the Court, is *diametrically opposed* to the asertion that the danger was "obvious"!

It appears that Industrial has now succeeded in winning a motion for summary judgment (a) on fact issues which it did not list in accordance with Local Rule 2.09 and in accordance with the rule of *Celotex, supra*, and its considerable progeny, and (b) on grounds diametrically opposed to the affidavit which it filed in support of its motion!

We believe reconsideration is warranted.

5. Negligence Independent of "Duty to Warn." This Court properly recognized additional bases for seller liability, independent of the "duty to warn", at footnote 10:

> "If the manufacturer had furnished warnings, the sellers presumably would have had knowledge of the defect, or, at the very least, *they would have been negligent in not forwarding the warnings to the consumer.*"

Evidence regarding this issue was discussed in our Original Brief, at pp. 12-14. At footnote 16, we quoted the testimony of David McGowan (Excerpt 16, p. 34) which we repeat here:

> "Q. And were you aware at that time (the shovel-eating demonstration) of the existence of the type of warning decals that were received in October?
>
> A. *I saw warning decals when I was there.*"

Accordingly, the issue of Industrial's failure to use the warning decals *was* an issue of fact, and *was* developed at trial. Additionally, we submitted to the District Court,

before trial, state-of-the-art literature which required the warning to be placed "next to the access door" of any structure containing an auger[9]. Indeed, it is Louisiana law that the warnings must be placed "in a manner likely to catch the user's attention..." *Easton v. Chevron*, 602 So.2d 1032 (4th Cir. 1992), at 1037.

Since McGowan testified that he saw the warning decals when he was at the plant in May, the failure to require the decals to be placed near the access door was negligence.

Particularly after the auger ate the shovel.

6. Other Legal Theories of Liability. Summary judgment is inappropriate if the mover is not entitled to judgment, *as a matter of law*. This ice storage system, sold by Industrial, was also defective for lack of interlocks, deadman controls and emergency stop devices. (See footnote 9) Because Industrial did not address these issues in its Rule 2.09 statement of undisputed facts, these theories were not briefed to the District Court. Prior to trial and in connection with our Jet-Wheel motion, we made the court aware of these additional bases for Industrial's liability. In our pre-trial memorandum and in our jury charges, we included the concept that a seller is negligent "...if he fails to otherwise protect users against such danger." Pre-trial Memorandum, p. 5 (001340)

7. The 'Merger" Doctrine. This Court has ruled that

---

[9] *Application of Interlocks, Deadman Controls and Emergency Stop Devises As a Design Strategy to Reduce Risk Associated with Agricultural Machinery*, J.B. Sevart, 3/19/82 (000888, Excerpt 2).

certain issues raised in our briefs were not before the Court because the appeal was taken from the judgment of dismissal. It is respectfully submitted that matters which are interlocutory in nature are "merged" into the final judgment and are reviewable upon appeal of the final judgment. While we find no Fifth Circuit cases on point, *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976) appears to answer this question, citing *9 Moore's Federal Practice* ¶*110.18*.

*8. **Conclusion.*** "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome..." *Conley v. Gibson*, 78 S.Ct. 99, 103; 355 U.S. 41, 48. We made one such misstep.

It appears that Mrs. Kelley's substantive rights may have been affected. We respectfully ask for reconsideration for the reasons set forth above.

Respectfully submitted:

/s/ Henry L. Klein

HENRY L. KLEIN, ESQ.
Bar No. 7440
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record by hand delivery, FAX and/or by depositing same into the United States Mail, properly addressed and postage prepaid on the 14th day of July, 1993.

/s/ Henry L. Klein

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
OCT 10-91

CYNTHIA ANN KELLEY, ET AL	*	CIVIL ACTION
VERSUS	*	NO. 88-2862
PRICE-MACEMON, INC., ET AL	*	SECTION "K"

* * * * * * * * * * * * * * * * * * * *

MOTION TO SUBMIT PHOTOGRAPH TO THE COURT

AND NOW INTO COURT, through undersigned counsel, comes plaintiff, Cynthia Ann Kelley, individually, an on behalf of her minor children, Jerred Seth Kelley and Cindy Lynn Kelley, and moves for leave to submit the annexed photograph to the Court, in connection with the pending *in limine* motion regarding the *Jet Wheel Doctrine.*

Mover suggests that the photograph is indicative of the way the auger appeared at the time Jack Kelley entered the silo and mover suggests that the photograph does not depict an obvious danger but rather masks the lethal nature of the auger.

DATE OF ENTRY Oct 10 1991

Respectfully submitted,

/s/ Henry L. Klein

HENRY L. KLEIN, ESQ.
(Bar No. 7440)
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

APPENDIX E

MINUTE ENTRY
ARCENEAUX, J.
NOVEMBER 13, 1991

FILED
NOV 13 91

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CYNTHIA ANN KELLEY, ET AL. **CIVIL ACTION**

VERSUS **NO. 88-2862**

RICE-MACEMON, INC., ET AL. **SECTION "K" (1)**

Plaintiff, Cynthia Ann Kelley, individually and on behalf of her minor children, Jerred Seth Kelley and Cindy Lynn Kelley, filed a motion for judgment notwithstanding the verdict or, in the alternative, a new trial in the above-captioned matter and noticed it for hearing on November 13, 1991. Having reviewed the memoranda in support, the opposition memoranda, and the applicable law, the court finds the motion for a new trial as to seller's liability to have merit.

This matter proceeded to trial on October 7, 1991. At the conclusion of the trial, the jury found for the defendant, Industrial Refrigerated Systems, Inc. ("Industrial").

DATE OF ENTRY NOV 14 1991

Specifically, the jury answered questions regarding Industrial's status as a manufacturer and negligence as a seller in the negative. Plaintiff now seeks a judgment notwithstanding the verdict as to seller liability or, in the alternative, a new trial on both Industrial's liability as a manufacturer and seller of the ice machine at issue.

1. Judgment Notwithstanding the Verdict

Rule 50(b) of the Federal Rules of Civil Procedure provides that, when a court does not grant a party's motion for a directed verdict at trial, a party may move within ten days after entry of judgment to set aside the jury verdict and have judgment entered in accordance with the party's motion. Fed. R. Civ. P. 50(b). The United States Court of Appeals for the Fifth Circuit has made clear the standard for deciding such a motion. In *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc), the court stated:

> On motions for directed verdict and for judgment notwithstanding the verdict the court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting the motion is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the mo-

> tions should be denied, and the case submitted to the jury.

Id. at 374-75; *see Lee v. Wal-Mart Stores, Inc.*, 943 F.2d 554, 557 (5th Cir. 1991). In this case, plaintiff has timely filed her motion for judgment notwithstanding the verdict, and the court has reviewed it based on the jurisprudence above.

Ms. Kelley, in support of her argument as to seller liability, contends that the jury most likely misapplied the law to the facts of this case with respect to the duty to warn imposed upon a seller. While the evidence may have shown Industrial, as a seller, knew or should have known of the ice machine's defect, the evidence does not meet the exacting standard necessary for judgment notwithstanding the verdict; it does not so conclusively prove that the defendant breached a duty to warn as to warrant a judgment notwithstanding the verdict. The court, therefore, finds that "reasonable and fair-minded" jurors could have reached differing conclusions as to Industrial's negligence in allegedly failing to warn of the machine's alleged defect.

The court, in viewing the evidence in a light most favorable to Industrial, holds that the weight of the evidence at this trial does not support plaintiff's motion. For this reason, the court finds plaintiff's arguments for judgment notwithstanding the verdict to be unpersuasive.

2. A New Trial

Plaintiff, in the alternative, asks that the court consider granting a new trial. In support, Ms. Kelley argues

that, under the evidence presented, liability could have been imposed on Industrial as a manufacturer or a seller of a defective product.

A court may grant a new trial "to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the court of the United States . . . ." Fed. R. Civ. P. 59(a). The Fifth Circuit has noted that this rule does not specify the grounds for a new trial, but one "may be granted, for example, if the district court finds the verdict is against the weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course." *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir. 1985). Under this legal standard and the facts before it, the court finds grounds present to grant a new trial.

In arriving at this conclusion, the court has examined the charges presented to the jury and finds that error may have indeed occurred of such magnitude as to persuade the court to grant the motion.[1] Plaintiff opines, and the court agrees, that the jury may not have had an adequate explanation of the duty to warn imposed upon a

[1] In so doing, the court notes that the parties failed to offer proposed jury instructions that could either appropriately or properly be used by the court. For example, plaintiff relied (and continues to rely) on the *Restatement of Torts 2d* even though counsel provides no support under Louisiana law for the use of that authority in this case (other than a single dissenting opinion). Defendant, on the other hand, did not offer proposed charges on the issue of products liability. The court, however, must view its instructions under the applicable law to make a proper determination on the issue of a new trial irrespective of the parties' failings.

seller in Louisiana. The testimony of David McGowan, Industrial's president, clearly indicates that he knew or should have known of the defect in the ice machine. Furthermore, the overwhelming weight of the evidence surely shows that Mr. McGowan, as the seller's corporate representative, failed despite such knowledge to provide adequate warnings about the ice machine's defects.[2] The jury, however, was without a proper explanation as to the duty imposed upon a seller to warn.

Defendant, in opposition, argues that the Louisiana case of *Thornhill v. Black, Sivalls & Brison, Inc.*, 385 So. 2d 336 (La. Ct. App. 1st Cir. 1980), *aff'd*, 394 So. 2d 1189 (La. 1981) (wrongful death action involving manufacturer and seller of screw-type auger), supports the position that no duty may be imposed upon a seller where the danger is obvious. For further support, Industrial argues that only constructive knowledge of such obvious danger is necessary. *See Ducote v. Liberty Mut. Ins. Co.*, 451 So. 2d 1211 (La. Ct. App. 4th Cir.), *cert. denied*, 457 So.2d 15 (1984) (wrongful death case involving manufacturer). While the court makes no findings on these issues of fact and law, the weight of the evidence at trial did not adequately prove that the ice machine (and, particularly, the auger-equipped bin) posed such an obvious danger or that the decedent was so aware thereof as to relieve Industrial of its duty to warn.

The weight of the evidence did support the fact that

---

[2] Defendant argues that Mr. McGowan and others knew of the auger's obvious danger and provided adequate warnings. The weight of the evidence, however, does not sustain defendant's contention that others knew of the obvious danger where employees regularly entered the ice silo as part of their duties or that Industrial provided warnings adequate to meet the requisites of Louisiana law.

other persons routinely entered the ice machine to assist in ice-making operations; other evidence placed in dispute the decedent's knowledge of the allegedly obvious danger. More importantly, the court has viewed a photograph submitted to it during the trial, which plaintiff's counsel failed to include in the pre-trial order and never offered into evidence (Record 248), which weights heavily against defendant's contentions regarding the obvious danger posed by the ice machine. While the failure to offer this evidence has played no part in the court's determination as to the need for a new trial, it nevertheless constitutes factual evidence that bolsters what the court believes to be an otherwise appropriate decision.

The court, in conclusion, notes it did not hold a jury charge conference prior to closing arguments. Rule 51 of the Federal Rules of Civil Procedure states that the court should inform counsel of its rulings with regard to requested jury instructions prior to closing arguments. *See* Fed. R. Civ. P. 51. While the dearth and lack of appropriate quality of the proffered charges would have made such conference for such purpose an empty and meaningless formality, and the lack of such conference for such purpose is not reversible error, the court finds that such omission could have perhaps given plaintiff's counsel a forum to articulate the objections he has now found voice to present concerning specific instructions on seller liability.[3]

---

[3] The court, in raising this issue, again notes that its failure to punctiliously follow the Federal Rules of Civil Procedure in this respect occurred because of the attorneys' less-than-helpful requested charges. *See supra* note 1. In fact, at the close of the charges at trial and in a memorandum supporting this motion, counsel for plaintiff has praised the court on the charges and, further, never has raised the issue of whether such a conference should have been held.

However, the weight of the evidence and possible error discussed above could only have affected the jury's findings as to seller liability. The evidence and record clearly show substantial support for the jury verdict absolving Industrial of fault as a manufacturer, and the court finds no error in its charge on that claim. Conversely, the court is convinced that a maifest injustice has occurred with respect to Industrial's possible liability as a seller of a dangerous product, including, specifically, the issue of this defendant's failure to warn.

The court, therefore, finds a new trial is necessary limited solely to the issue of seller's liability. To that extent, the plaintiff's motion is **GRANTED**.

The Courtroom Deputy shall hold a preliminary pre-trial conference to schedule dates for a new pre-trial conference and trial. Deadlines for conducting discovery and the filing of pre-trial pleadings shall remain closed. A revised pre-trial order for a trial on seller's liability, however, shall be confected and submitted in accordance with this court's rules.

IT IS SO ORDERED.

/s/J. Arceneaux

UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
APR 10 92

CYNTHIA ANN KELLEY, ET AL	*	CIVIL ACTION
	*	
VERSUS	*	NO. 88-2862
	*	
PRICE-MACEMON, INC., ET AL	*	SECTION "K"
	*	

* * * * * * * * * * * * * * * * * * * *

MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, comes defendant, Industrial Refrigerated Systems, Inc., who moves this Honorable Court for Summary Judgment in accordance with Federal Rule of Civil Procedure 56 for the reason that under the pleadings, depositions, admissions, Answers to Interrogatories and Affidavits, there is no genuine issue as to any material fact and that the moving party is entitled to Judgment as a matter of law.

WHEREFORE, defendant, Industrial Refrigerated Systems, Inc., requests that its Motion for Summary Judgment be granted, dismissing the plaintiffs' suit at their sole cost.

Respectfully submitted,

/s/ Claude D. Vasser

CLAUDE D. VASSER(#19278) T.A.
LEIGH ANN SCHELL (#19811)
VASSER & TRINCHARD
Suite 2030, 601 Poydras Street
New Orleans, Louisiana 70130
(504) 523-3795
Attorneys for Defendant,
Industrial Refrigerated Systems,
Inc.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CYNTHIA ANN KELLEY, ET AL	*	CIVIL ACTION
	*	
VERSUS	*	NO. 88-2862
	*	
PRICE-MACEMON, INC., ET AL	*	SECTION "K"
	*	

* * * * * * * * * * * * * * * * * * * *

STATEMENT OF UNCONTESTED FACTS

NOW INTO COURT, through undersigned counsel, comes defendant, Industrial Refrigerated Systems, Inc., who states that the following facts are not in dispute or concerning which there is no material dispute in connection with its motion for summary judgment:

I.

The accident which forms the basis of this suit occurred on July 5, 1987.

II.

The accident occurred in an ice storage bin manufactured by Price-Macemon/Rochester Silo.

III.

The ice storage bin was not manufactured by In-

dustrial Refrigerated Systems, Inc. Instead, Industrial Refrigerated Systems, Inc. acted only as the retail seller of the ice storage bin.

Respectfully submitted,

/s/ Claude D. Vasser

CLAUDE D. VASSER(#19278) T.A.
LEIGH ANN SCHELL (#19811)
VASSER & TRINCHARD
Suite 2030, 601 Poydras Street
New Orleans, Louisiana 70130
(504) 523-3795
Attorneys for Defendant,
Industrial Refrigerated Systems,
Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 10th day of April, 1992, served a copy of the above and foregoing pleading on all counsel of record, either by hand delivery or by placing same in the U. S. Mail, properly addressed and postage prepaid.

/s/ Leigh Ann Schell

LEIGH ANN TSCHIRN SCHELL

AFFIDAVIT

STATE OF TEXAS

COUNTY OF HARRIS

BEFORE ME, the undersigned authority, personally came and appeared David McGowan, a person of the full age of majority, who after being duly sworn, did depose and say:

That he is Vice-President of Industrial Refrigerated Systems (IRS); that with respect to the attached sales contract of January 5, 1987, IRS neither designed, manufactured, operated or maintained any of the equipment described in the sales contract; that IRS placed an order for the equipment to the manufacturer of the ice machine, Turbo Refrigeration Company, and the manufacturer of the ice storage bin, Price-Macemon/Rochester Silo, Inc.; that the equipment was shipped directly to the ice plant site by the manufacturers; that during installation of the equipment, a representative of Price-Macemon/Rochester Silo, Inc., Wallace Macemon, recommended that dewatering screws be installed on the ice storage bin; that the cost of this additional item, which was not included in the original equipment shipped by Price-Macemon/Rochester Silo, Inc., was paid for by IRS, and not rebilled to Demere since it was a minor expense item; that all other costs for purchase of the equipment was billed by IRS to Demere and paid by the Demeres, that all costs for the installation of the equip-

EXHIBIT
"A"

ment, including all personnel hired to install the equipment, were arranged for and paid for entirely by the Demeres, and the Demeres hired David Easley of Boyd Refrigeration as the contractor to coordinate and supervise the installing of the equipment and the construction of the ice plant, and other contractors were hired to construct a foundation structure for the plant, based on plans drawn by David Easley; that an on-site technical representative, provided by and paid for by Price-Macemon/Rochestser Silo, Inc., was present during construction of the ice plant to provide technical assistance in the proper installation of their equipment; that at the time of the sale of the Turbo Refrigeration Company ice making machine, and the Price-Macemon/Rochester Silo, Inc. ice storage bin, and all related equipment to the Demeres, IRS had no knowledge of any alleged defects in any of the equipment, and IRS was never aware of any alleged dangerous or unsafe condition in the equipment at any time prior to the accident involving Mr. Kelley.

David McGowan

DAVID MCGOWAN

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 26 DAY
OF AUGUST, 1991.

/s/Linda Suarez

NOTARY PUBLIC

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
APR 22 92 - 11:57AM

CYNTHIA ANN KELLEY, ET AL. CIVIL ACTION

VERSUS NO. 88-2862

PRICE-MACEMON, INC., ET AL. SECTION "K" (1)

ORDER AND REASONS

Defendant, Industrial Refrigerated Systems, Inc. ("Industrial"), filed a motion for summary judgment on April 10, 1992, and noticed this motion for hearing on April 29, 1992. According to the certificate of service, Industrial's counsel timely delivered a copy of this motion to plaintiff's counsel.

Local Rule 2.07 of the Eastern District of Louisiana requires that memoranda in opposition to a motion be filed *AND* a copy be delivered to chambers eight days prior to the date set for hearing of the motion. In this case, plaintiff's counsel should have filed and delivered any reply or opposition no later than April 21, 1992. No memorandum in opposition or other reply to Industrial's motion, however, has been timely submitted by plaintiff's counsel.

DATE OF ENTRY APR 22 1992

Accordingly, this motion is deemed to be unopposed, and, further, it appearing to the Court that the motion has merit,

IT IS ORDERED that the motion is **GRANTED**. Judgment shall be entered accordingly.

IT IS FURTHER ORDERED that plaintiff's counsel shall send a copy of this order and reasons to his client and certify having taken such action by filing an affidavit into the record *AND* by delivering a copy of such affidavit to the undersigned's chambers no later than May 1, 1992, at 4:30 p.m.

A motion for reconsideration of this order based on grounds found in Rule 60(b) of the Federal Rules of Civil procedure, if any, must be filed within thirty (30) days. The motion must be accompanied by an opposition memorandum to the original motion. Because such a motion would not have been necessary had a timely opposition memorandum been filed, the costs incurred in connection with the motion, including attorney's fees, will be assessed against the party moving for reconsideration. *See* Fed. R. Civ. P. 16, 83. A statement of costs conforming to Local Rule 5.04 shall be submitted by all parties desiring to be awarded costs and attorney's fees no later than eight (8) days prior to the hearing of the motion for reconsideration.

IT IS SO ORDERED.

New Orleans, Louisiana, this 22nd day of April 1992.

/s/ J. Arceneaux

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
APR 22 92

CYNTHIA ANN KELLEY, ET AL.	**CIVIL ACTION**
VERSUS	**NO. 88-2862**
PRICE-MACEMON, INC., ET AL.	**SECTION "K" (1)**

JUDGMENT

This matter having come before the court and a decision having been duly rendered and, further, finding no just reason for delay pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,

IT IS ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered in favor of the defendant, Industrial Refrigerated Systems, Inc., and against plaintiff Cynthia Ann Kelly, individually and on behalf of her minor children, Jerred Seth Kelley and Cindy Lynn Kelley, dismissing said plaintiff's claims with prejudice, each party to bear their own costs.

New Orleans, Louisiana, this 22d day of April 1992.

/s/ J. Arceneaux
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY APR 23 1992

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
APR 28 92

CYNTHIA ANN KELLEY, ET AL	*	CIVIL ACTION
VERSUS	*	NO. 88-2862
PRICE-MACEMON, INC., ET AL	*	SECTION "K"

* * * * * * * * * * * * * * * * * * *

MOTION FOR RECONSIDERATION

AND NOW INTO COURT, through undersigned counsel, comes plaintiff, Cynthia Ann Kelley, individually, and on behalf of her minor children, Jerred Seth Kelley and Cindy Lynn Kelley, and moves for reconsideration of this Court's order of April 22, 1992, on the grounds set forth in Rule 60(b) of the Federal Rules of Civil Procedure, for those reasons set forth in the annexed memorandum and as set out in the affidavit of counsel filed herein.

Respectfully submitted,

/s/ Henry L. Klein

HENRY L. KLEIN, ESQ.
(Bar No. 7440)
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record by FAX and/or by depositing same into the United States Mail, properly addressed and postage prepaid on this 27th day of April, 1992.

/s/ Henry L. Klein

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CYNTHIA ANN KELLEY, ET AL	*	CIVIL ACTION
VERSUS	*	NO. 88-2862
PRICE-MACEMON, INC., ET AL	*	SECTION "K"

* * * * * * * * * * * * * * * * * * * *

MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION

MAY IT PLEASE THE COURT:

Rule 60(b)(1) of the Federal Rules of Civil Procedure provides that "...the court may relieve a party or his legal representative from a final judgment, order or proceeding for...mistake, inadvertence, surprise of excusable neglect."

In the case at bar, the Court has rendered Judgment, dated April 22, 1992. Plaintiff became aware of the pendency of the motions for summary judgment, as set forth in the annexed affidavit sometime on the afternoon or early evening of April 21, 1992, and immediately sought to obtain approval from opposing counsel, preliminary to making a request for an extension with the Court.

As set forth in the affidavit filed herewith, plaintiff's counsel called the Court to ascertain the next available and appropriate date so that a motion for extension could be filed, only to discover that Judgment had been rendered. It

is respectfully submitted that the failure to meet the deadline on April 21, 1992, was due to mistake, inadvertence and/or excusable neglect. Counsel meant no disrespect to the Court, nor did counsel intend to allow the matter to go "unopposed." Counsel, as the Court can see by the detail involved in the brief which needed to be filed in the matter of *Schlesinger v. Herzog, supra*, was veritably immersed in meeting a deadline which resulted in the inadvertent failure to notice that certain motions had been filed in the above captioned matter.

While there are cases from various circuits which speak to this issue, we believe that the Fifth Circuit decision in *Hibernia v Administracion Central Sociedad Anonima, et al*, 776 F.2d 1277 (1985), is dispositive. There, a motion for summary judgment was granted under similar circumstances. The District Court refused to grant a rule 60(b) motion, and the Court of Appeals reversed, noting that the rule "...is to be liberally construed so that doubtful cases may be resolved upon the merits," citing *Laguna Royalty Co. v. Marsh*, 350 F.2d 817, 823 (5th Cir.1965).

The cases generally seem to consider the diligence in counsel's filing the 60(b) motion, the nature of the inadvertence, the merits of the motions themselves, and (in cases denying relief) the refusal by the moving party to expeditiously explain the circumstances surrounding the neglect, mistake or inadvertence.

Here, we hope the Court realizes that we would not allow, purposefully, any substantive motion to go unopposed. We have, when appropriate, communicated to the Court our agreement with motions as to which we would not file

an opposition. But at all times, we respectfully submit, we have been diligent (although perhaps not perfect) in our efforts to protect our client's interests.

The inadvertence which resulted in this Court's Judgment of April 22, 1992, was unintended, and we ask that the Court, in its wisdom and discretion, excuse the mistake.

Respectfully submitted,

/s/ Henry L. Klein

HENRY L. KLEIN, ESQ.
(Bar No. 7440)
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record by FAX and/or by depositing same into the United States Mail, properly addressed and postage prepaid on this 27th day of April, 1992.

/s/ Henry L. Klein

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CYNTHIA ANN KELLEY, ET AL	*	CIVIL ACTION
VERSUS	*	NO. 88-2862
PRICE-MACEMON, INC., ET AL	*	SECTION "K"

* * * * * * * * * * * * * * * * * * * *

AFFIDAVIT IN SUPPORT OF MOTION FOR RECONSIDERATION

PARISH OF ORLEANS

STATE OF LOUISIANA

BEFORE ME, the undersigned authority, personally came and appeared:

HENRY L. KLEIN

who after first being duly sworn, did depose and say:

(1) That he is counsel of record for Cynthia Ann Kelley, individually, and on behalf of her minor children, Jerred Seth Kelley and Cindy Lynn Kelley;

(2) That affiant is a sole practitioner, and is handling the above captioned matter as "of counsel" for Heisler & Wysocki;

(3) That on April 9, 1992, affiant left New Orleans on a combination vacation/brief-writing leave in order to, in part, prepare a brief in the matter of *Schlesinger v. Herzog*, No. 90-4051, Section "D", United States District Court, which affiant had tried before the Honorable A.J. McNamara, and on which a brief of 50 pages or less was due on or before April 22, 1992;

(4) That affiant did not become aware that various motions had been filed in the above captioned matter until after he returned and saw the motions in the late afternoon or early evening of April 21, 1992;

(5) That affiant was then deeply involved in the conclusion of the brief requested by Judge MacNamara, which brief required detailed reference to the trial record, all as is shown by appendix "A" to this affidavit;

(6) That when affiant noticed that Industsrial Refrigerated Systems, Inc. had filed its motions, affiant immediately called opposing counsel to obtain his consent to an extension prior to requesting leave of Court, as affiant believes he was required to do;

(7) That affiant was unable to reach opposing counsel until Wednesday afternoon, at which time opposing counsel indicated that he had no objection to an extension of time within which to file an opposition to the motions filed;

(8) That affiant intended to file such a motion Thursday morning; on Wednesday night, however, a close

neighbor, good friend, and civic co-worker of affiant was murdered,[1] and affiant spent most, if not all of Thursday, dealing with neighborhood leaders and members of the victim's family:

(9) That on Friday morning, affiant called the Court and spoke to the Court's law clerk regarding the submission of a motion for an extension of time and regarding the next appropriate and available hearing date, and was told that the Court had entered certain orders which affiant should obtain from the clerk;

(10) That affiant immediately went to the Clerk's Office and obtained copies of the Court's Order of April 22, 1992, granting the Motion for Summary Judgment and dismissing plaintiff's claims;

(11) That affiant immediately proceeded to prepare for filing, oppositions to the motions, and a motion to reconsider pursuant to the provisions of Rule 60(b) of the Federal Rules of Civil Procedure;

(12) That affiant, at no time, intended not to oppose the motions filed;

(13) That affiant, at no time, intended to disregard

---

[1] Affiant lives at 1467 Moss Street, which is almost midway between the location of an armed robbery at 900 N. Carrollton Avenue and 900 Harding Drive. Affiant had been working with Jack Bartlett and other neighborhood leaders regarding the use of Our Lady of the Holy Rosary School by the public school system. In affiant's capacity as a member of the Mayor's Task Force on Bayou St. John, and as a neighbor, affiant's total day on Thursday was devoted to this tragedy. Otherwise, affiant would have filed a motion for leave first thing Thursday morning.

the Court's local rules under specific rules applicable in Section "K", and the failure to file an opposition was through error and inadvertence and hopefully, excusable neglect.

Further affiant says not.

/s/ Henry L. Klein
HENRY L. KLEIN

SWORN TO AND SUBSCRIBED BEFORE ME, NOTARY, ON THIS THE 27th DAY OF APRIL, 1992.

/s/ James J. Morrison, Jr.
NOTARY PUBLIC

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed April 28, 92

CYNTHIA ANN KELLEY, ET AL	*	CIVIL ACTION
VERSUS	*	NO. 88-2862
PRICE-MACEMON, INC., ET AL	*	SECTION "K"

* * * * * * * * * * * * * * * * * * *

MEMORANDUM IN OPPOSITION TO MOTION OF INDUSTRIAL REFRIGERATED SYSTEMS FOR SUMMARY JUDGMENT ON SELLER LIABILITY

MAY IT PLEASE THE COURT:

Industrial Refrigerated Systems, Inc. ("IRS"), has filed a Motion for Summary Judgment on its liability herein as a "seller" of the ice storage bin manufactured by Price-Macemon/Rochester Silo. It premises its motion, *inter alia*, on an affidavit which was filed in connection with a previously denied motion for summary judgment, executed by David McGowan on August 26, 1991.

The essence of the motion and the affidavit in support thereof is that IRS was a mere "broker" and that IRS had no possession or control over the equipment or design.[1] Additionally, IRS disclaims knowledge of any

[1] Memorandum, at p. 2: Affidavit of McGowan.

defects and denies a breach of duty to warn.

We respectfully submit that the issues raised by this motion have previously been rejected by the Court, for good reason, and constitute "The Law of the Case." Alternatively, the motion should not be granted because there exist genuine issues of material facts regarding IRS's actual knowledge of the inherently dangererous nature of the bin and auger at issue.[2]

Indeed, the following quotations from previous rulings, by the Court, preclude the granting of the present motion, which insists that IRS was a "mere broker."

March 12, 1991, Memorandum and Order:

> "Jack Kelley, the husband of Cynthia Kelley and father of the minor plaintiffs, was fatally mangled in an ice auger while working for a company owned and operated by the Demere family. Turbo was the manufacturer of the ice maker which produced the ice which rotated through the auger. Plaintiff sued Turbo in that capacity, as well as other defendants, including Industrial Refrigerated Systems, Inc. ("Industrial"). *Industrial was the entity which sold the system to the Demeres.* Industrial did not manufacture the component

---

[2] We incorporate herein by reference, the testimony of David McGowan, filed with the Court in connection with our post-trial motions, detailing how everyone watched as a shovel was fed into the auger as a "demonstration" prior to the plant opening.

This testimony, already of record, creates issues of fact which *cannot* be resolved by a summary judgment in favor of IRS.

parts *but did direct the building of the system on site.*"[3]

Second March 12, 1991, Memorandum and Order:

"The instant case centers around the unfortunate death of Jack Kelley when he was mutilated by an ice auger while working for a company owned by members of the Demere family. Plaintiffs, the wife and children of decedent, filed this suit against numerous defendants, including Industrial Refrigerated Systems, Inc. ("Industrial"). *Industrial sold the concept of the ice factory and the ice machine to the Demere family.* Industrial did not make the component parts, *but did put the machine together on the premises.*"[4]

October 9, 1991, Minute Entry:

"In the court's view, plaintiff has stated a cognizable claim against the defendant Industrial (as the trial has convinced the court further) *and certain fact issues needed to be decided by a jury rather than the court.*"[5]

November 13, 1991, Minute Entry:

"While the evidence may have shown Industrial,

---

[3] We anticipated that IRS may call this *obiter dicta.* And that may or may not be. However, the Court consistently so held and the rulings on plaintiffs' post-trial motions, quoted below, are *not obiter dicta.*

[4] *Id.*

[5] Hereinafter, we do not believe the Court's rulings on the existence of fact issued is *obiter dicta.*

as a seller, *knew or should have known of the ice machine's defect,* the evidence does not meet the exacting standard necessary for judgment notwithstanding the verdict; it does not so conclusively prove that the defendant breached a duty to warn as to warrant a judgment notwithstanding the verdict. The court, therefore, finds that "reasonable and fair-minded" jurors *could have reached differing conclusions as to Industrial's negligence in allegedly failing to warn of the machine's alleged defect.*"

* * *

"A court may grant a new trial 'to all or any parties and on all or part of the issues...in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States....' Fed. R. Civ. P. 59(a). The Fifth Circuit has noted that this rule does not specify the grounds for a new trial, but one 'may be granted, for example, *if the district court finds the verdict is against the weight of the evidence,* the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course." *Smith v. Transworld Drilling Co.,* 773 F.2d 610, 613 (5th Cir. 1985). Under this legal standard and the facts before it, the court finds grounds present to grant a new trial."

* * *

"The testimony of David McGowan, Industrial's president, clearly indicates *that he knew or*

should have known of the defect in the ice machine. Furthemore, the overwhelming weight of the evidence surely shows *that Mr. McGowan, as the seller's corporate representative, failed despite such knowledge to provide adequate warnings about the ice machine's defects.*[6]

* * *

"While the court makes no findings on these issues of fact and law, the weight of the evidence at trial did not adequately prove that the ice machine (and, particularly, the auger-equipped bin) posed such an obvious danger or that the decedent was so aware thereof as to relieve Industrial of its duty to warn."

* * *

"...the court is convicted that a manifest injustice has occurred *with respect to Industrial's possible liability as a seller of a dangerous product, including, specifically, the issue of this defendant's failure to warn.*"

January 27, 1992, Minure Entry:

"In the order granting a new trial, the court

---

[6]See Footnote 2 by the Court:

"Defendant argues that Mr. Gowan and others knew of the auger's obvious danger and provided adequate warnings. The weight of the evidence, however, does *not* sustain defendant's contention *that others knew of the obvious danger* where employees regularly entered the ice silo as part of their duties or that Industrial provided warnings adequate to meet the requisites of Louisiana Law."

> found that substantial error may been (sic) committed and that the evidence *did not clearly support the jury's verdict on seller's liability.*"

The present motion for summary judgment is not only ill-founded, on it's face, but would have the Court reverse itself on already well-reasoned interlocutory decisions, regarding fact issues that would more reasonably warrant summary judgment in favor of plaintiff.[7]

In order to deal with the pending motion, the Court, if inclined to go beyond it's own previous rulings, need not look beyond the first paragraph:

> "Louisiana law is well settled as to the duty imposed on retail sellers. According to the Louisiana decisions, '[t]ort liability for a defective product attaches to a non-manufacturer seller who does not vouch for the product by holding it out as his own or who is not a professional vendot or merchant "*only if he knew or should have known' that the product sold was defective and failed to declare it.*" ' *Nelton v. Astro-lounger Manufacturing Co.,* 542 So.2d 128 (La.App. 1st Cir. 1989) (citing *Harris v. Atlanta Stove Works, Inc.,* 428 So.2d 1040, 1043 (La. App. 1st Cir.), *writ denied,* 434 So.2d 1106 (La. 1983))."

This is, indeed, the law. And it is the application of that law that precludes the pendent motion from being

---

[7] In our motion for directed verdict, and in our post-trial motion for Judgment n.o.v., we believe and argued that all of the elements of seller liability were established so as to warrant judgment in favor of plaintiff on that issue. We respectfully submit that this is still the case, although we do not, for now, so move.

granted. As the Court has already ruled, Industrial *did* have knowledge of the alleged defects in the orbital bin at the time of the sale, Industrial *did* have a duty to warn the buyer.

These are, at best, fact issues, and the motion should therefore be DENIED.

Respectfully submitted,

/s/ Henry L. Klein

HENRY L. KLEIN, ESQ.
(Bar No. 7440)
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record by FAX and/or by depositing same into the United States Mail, properly addressed and postage prepaid on the 27th day of April, 1992.

/s/ Henry L.Klein

APPENDIX J

These two warning decals *were* sent by the manufacturer to the seller, Industrial Refrigerated Systems, Inc. and *were* available when the Auger-eating demonstration took place. Page A-49, *supra.*

The Court of Appeals recognized a separate basis for seller liability where sellers fail to use warnings supplied to them, but nevertheless granted summary judgment, *sua sponte,* on matters *not* raised by the underlying motion. These decals were introduced at trial and were part of the total record.

WARNING

WARNING

MAINTENANCE OF SYSTEM FROM INSIDE STRUCTURE

1. A MINIMUM OF ONE OBSERVER BE PRESENT AT ALL TIMES OUTSIDE OF STRUCTURE TO MONITOR ACTIVITIES INSIDE AND OUTSIDE OF STRUCTURE DURING ANY INTERNAL MAINTENANCE.
2. DISCONNECT AND LOCK OUT ALL POWER SOURCES IN OFF POSITION. (It is recommended that you padlock control panel shut - and person entering silo have possession of key)
3. REVIEW OPERATORS' MANUAL SAFETY SECTION BEFORE ENTERING.
4. DO NOT ALLOW CHILDREN OR MINORS TO ENTER STRUCTURE. INEXPERIENCE MAY RESULT IN DEATH.
5. MAINTENANCE WITHIN THE STRUCTURE IS EXTREMELY DANGEROUS — PLEASE — FOR YOUR OWN LIFE — OBEY THE ABOVE AND ALL OTHER SAFETY PRECAUTIONS.

THIS SIGN TO BE PLACED ON OR NEXT TO STRUCTURE ACCESS DOOR

⚠ DANGER

ROTATING AUGER CAN KILL OR DISMEMBER

KEEP ALL GUARDS, COVERS AND SHIELDS IN PLACE.

INSTALL SAFETY PLATE BEFORE OPERATING.

STAY WELL CLEAR OF AUGER AND KEEP OTHERS AWAY WHEN OPERATING.

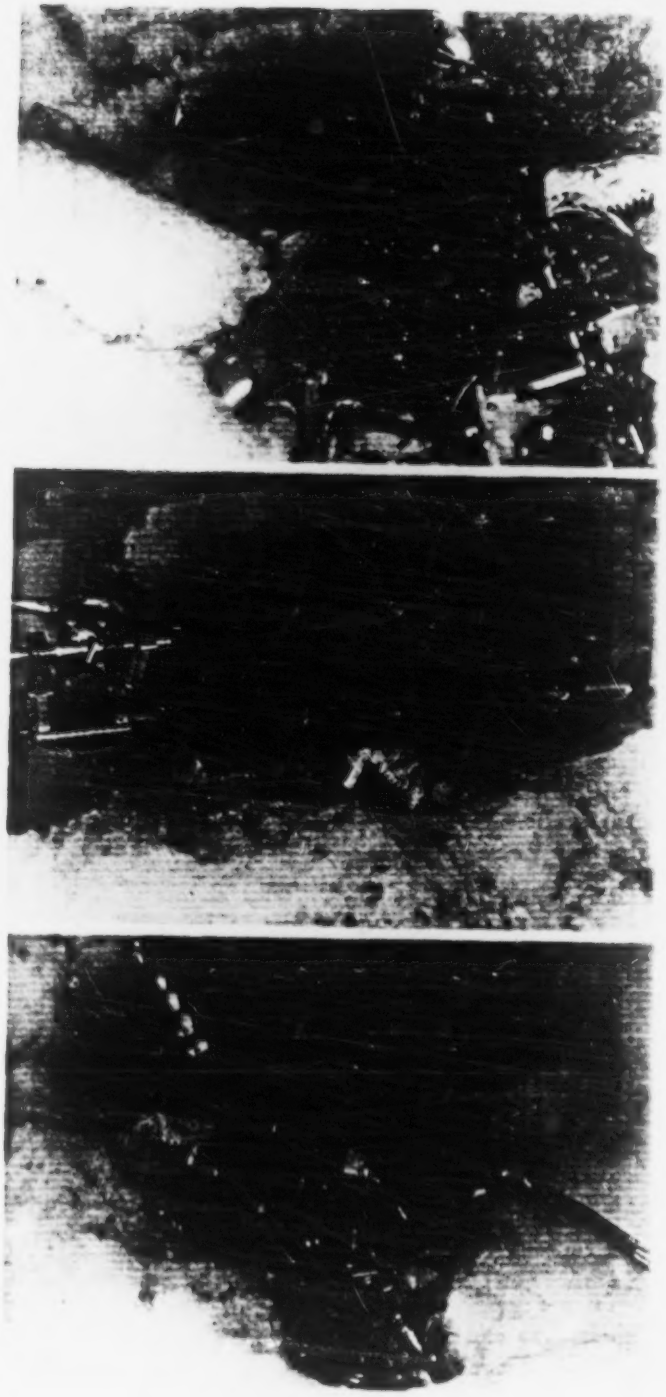
DISCONNECT & LOCKOUT POWER SOURCE BEFORE SERVICING.

FAILURE TO HEED MAY RESULT IN PERSONAL INJURY OR DEATH

APPENDIX K

W A R N I N G

These photographs of Jack Kelley's torso are gruesome and may be shocking to a viewer.



PLAINTIFF'S
EXHIBIT

(3)

Supreme Court, U.S.
FILED
NOV 23 1993
CLERK

No. 93-675

In The

Supreme Court of the United States

October Term, 1993

CYNTHIA KELLEY, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN JERRED SETH KELLEY AND CINDY LYNN KELLEY,

Petitioners,

vs.

INDUSTRIAL REFRIGERATED SYSTEMS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CLAUDE D. VASSER
Counsel of Record
C. DAVID VASSER, JR.
LEIGH ANN SCHELL
VASSER & VASSER
Attorneys for Respondent
2030 Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
(504) 523-6477

BEST AVAILABLE COPY

4475
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

25pp

QUESTIONS PRESENTED

I. The decision of the Fifth Circuit Court of Appeals, affirming summary judgment in favor of Industrial Refrigerated Systems, does not present issues warranting exercise of this Court's supervisory review since the decision is not in conflict with those of other circuits and accurately applies Louisiana law regarding the duties of a retail seller.

II. The Fifth Circuit correctly affirmed the trial court's summary judgment in favor of respondent, Industrial Refrigerated Systems, since, as a matter of law, Industrial Refrigerated Systems did not have a duty to warn Jack Kelley regarding the potential danger of the ice machine at issue since any danger presented by the ice machine's auger was open and obvious.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Statutory Authority	1
Statement of the Case	2
A. Course of Proceedings and Disposition in Court Below	2
B. Statement of the Facts	6
Summary of the Argument	7
Reasons for Denying the Writ	8
I. The decision of the Fifth Circuit Court of Appeals, affirming summary judgment in favor of Industrial Refrigerated Systems, does not present issues warranting exercise of this Court's supervisory review since the decision is not in conflict with those of other circuits and accurately applies Louisiana law regarding the duties of a retail seller.	8
II. The Fifth Circuit correctly affirmed the trial court's summary judgment in favor of respondent, Industrial Refrigerated Systems, since, as a matter of law, Industrial Refrigerated Systems did not have a duty to warn Jack Kelley regarding the	

Contents

Page

potential danger of the ice machine at issue since any danger presented by the ice machine's auger was open and obvious. 11

A. Both the District Court and the Court of Appeals Properly Used Summary Judgment in this Case. 11

B. As a Retail Seller, Industrial Had No Duty to Warn Jack Kelley of the Auger's Obvious Danger. 14

Conclusion 18

TABLE OF CITATIONS

Cases Cited:

American v. Duo Fast Dixie, 367 So. 2d 415 (La. App. 4th Cir. 1979) 9, 14

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2501, 91 L. Ed. 2d 202 (1986) 12

Braxton v. United States, 111 S. Ct. 1854, 114 L. Ed. 2d 385 (1991) 9

Chappuis v. Sears Roebuck & Co., 358 So. 2d 926 (La. 1978) 9

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) 12

Contents

Page

Davidson v. Stanadyne, Inc., 718 F.2d 1334 (5th Cir. 1983) 11

Decote v. Liberty Mut. Ins. Co., 451 So. 2d 1211 (La. App. 4th Cir. 1984), *writ denied*, 457 So. 2d 15 (La. 1984) .. 15

Delanzo v. ABC Corp., 572 So. 2d 648 (La. App. 5th Cir. 1990) 9, 14

Erie R.R. v. Tompkins, 304 U.S. 64, 56 S. Ct. 817, 82 L. Ed. 1118 (1938) 8

Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110 (La. 1986) 14, 15, 17

Harris v. Pizza Hut, 455 So. 2d 1364 (La. 1984) 11, 14

Home Ins. Co. v. National Tea Co., 577 So. 2d 65 (La. App. 1st Cir. 1990), *aff'd in part, rev'd in part on other grounds*, 588 So. 2d 361 (La. 1991) 14, 15

Hopper v. Crown, 555 So. 2d 46 (La. App. 1st Cir. 1989), *rev'd*, 558 So. 2d 1117 (La. 1990) 14, 15

Johnson v. Hartford Ins. Co., 623 So. 2d 35 (La. App. 1st Cir. 1993) 16

Kelley v. Industrial Refrigerated Systems, Inc. 992 F.2d 1408 .....2, 5, 8, 12, 14, 17

LeBleu v. Home Light Div. of Textron, Inc., 509 So. 2d 563 (La. App. 3d Cir. 1987) 15

Contents

Page

Lavespere v. Niagara Mach. & Tool Works, 910 F.2d 167 (5th Cir. 1990) 12, 13

Lovell v. Earl Grissmer Co., 422 So. 2d 1344 (La. App. 1st Cir. 1982), *writ denied*, 427 So. 2d 871 (1983) 15

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2ds 538 (1986) ... 12

Melton v. Deere & Co., 887 F.2d 1241 (5th Cir. 1989) 13, 17

Nelton v. Astro-Lounger Manufacturing Co., 542 So. 2d 128 (La. App. 1st Cir. 1989) 14

Putnam v. Gulf States Utilities, 588 So. 2d 1223 (La. App. 1st Cir. 1991) 11, 16

Reid v. State Farm Mut. Auto Ins. Co., 784 F.2d 577 (5th Cir. 1986) 12

Sperry-New Holland v. Prestage, 617 So. 2d 248 (Miss. 1993) 15

Spillers v. Montgomery Ward & Co., 294 So. 2d 803 (La. 1974) 14

Thornhill v. Black, Sivalls & Brison, Inc., 394 So. 2d 1189 (La. 1981) 9, 13, 15

Trevino v. Yamaha Motor Corp. 882 F.2d 182 (5th Cir. 1989) 11

Contents

Page

Walker v. Sears, Roebuck & Co., 853 F.2d 355 (5th Cir. 1988) 12

Winterrowd v. Travelers Indem. Co., 462 So. 2d 639 (La. 1985) 16

Statutes Cited:

La. Civ. Code art. 2545 ..... 1, 14

La. R. S. 9:2800.51, *et seq.* 15

La. R.S. 9:2800.57 1

La. R.S. 9:2800.57(B)(2) 15

28 U.S.C.A. 1292(b) 4

Rules Cited:

Federal Rules of Civil Procedure:

Rule 54(b) 13

Rule 56 4

Rule 56(c) 12

Uniform Local Rule 2.07E 4

Supreme Court Rule 10 ..... 7, 9

STATUTORY AUTHORITY

Art. 2545. Liability of seller for concealment of vice.

> The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of price and repayment of the expenses, including reasonable attorney's fees, is answerable to the buyer in damages.

La. Civ. Code Art. 2545 (West Supp. 1993).

§ 2800.57. Unreasonably dangerous because of inadequate warning.

> B. A manufacturer is not required to provide an adequate warning about his product when:
>
> (1) The product is not dangerous to an extent beyond that which would be contemplated by the ordinary user or handler of the product, with the ordinary knowledge common to the community as to the product's characteristics; or
>
> (2) The user or handler of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic.

La. R.S. 9:2800.57 (West 1991).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

At this stage of the proceedings, respondent, Industrial Refrigerated Systems, Inc. ("Industrial"), has obtained both a jury verdict and a summary judgment in its favor. Additionally, the summary judgment in its favor was affirmed by the Fifth Circuit Court of Appeals as reported at 992 F.2d 1408. Subsequently, the petitioner's Petitions for Rehearing and for En Banc consideration were denied.

This suit arises out of an accident which occurred on July 5, 1987, at the Demere Ice Company's ice plant in Leeville, Louisiana. Cynthia Ann Kelley, the surviving spouse of Jack Kelley, filed suit individually and on behalf of her minor children, naming, among others, Industrial as a defendant. On the date of the accident, Mrs. Kelley's husband, Jack Kelley, was fatally injured when he became entangled in an ice auger located inside of an ice storage bin manufactured by Price-Macemon/Rochester Silo, Inc.[1]

Petitioner filed this action on July 1, 1988, naming several defendants, including Industrial, the retail seller of the ice-making equipment. However, prior to trial, all other remaining defendants

---

1. Petitioner has attached gruesome photographs of Jack Kelley as Appendix K (A-90-91) solely for the purpose of inflaming the court since the attached photographs were not admitted into evidence at trial, nor were they made part of the petitioner's opposition to the motion for summary judgment, and have little or no probative value. Additionally, the photograph submitted by the petitioner as A-55, Appendix D, was not an accurate depiction of the inside of the storage bin and the auger at the time of the accident, had no supporting testimony at the trial, was never discussed at the trial, was never offered into evidence and therefore was never admitted into evidence. It was first mentioned by petitioner in post-trial briefs. In fact, petitioner was admonished by the Fifth Circuit at oral argument for including the photographs as part of his brief to that court since the photographs were not part of the record.

were dismissed with the exception of Rochester Silo. The action against Rochester Silo, the successor in interest to Price-Macemon, was severed due to that company's bankruptcy. Price-Macemon had manufactured the ice-making equipment at issue.

The trial of this matter began on October 7, 1991. At trial, the petitioner claimed that Industrial was the *manufacturer* of the ice plant or, alternatively, was liable as a *retailer seller* for failing to supply warnings or limit switches in connection with the sale of the ice-making equipment. After three days of testimony, the jury *unanimously* concluded that Industrial was a retail seller, not the "manufacturer" of the ice plant. In addition to not having actually manufactured the equipment, the jury concluded that Industrial did not assemble the equipment, vouch for the product by holding it out as its own, or act as a professional vendor or merchant. The jury also found in favor of Industrial on the issue of seller liablity concluding that it was not negligent in performing any of the duties of a retail seller. (R. 1182).

The district court entered a judgment in accordance with the jury's verdict on October 11, 1991. (R. 1252). Subsequently, on October 21, 1991, the petitioner filed a Motion for Judgment Notwithstanding the Verdict or Alternatively, for a New Trial. In her motion for new trial, the petitioner argued that Industrial was, in fact, a "manufacturer." Second, the petitioner urged the court to grant the motion on its own initiative. (R. 1153). Industrial filed a timely opposition to the Motion for Judgment Notwithstanding the Verdict or Alternatively, for a New Trial. (R. 1798). In granting the petitioner's motion for new trial, the district court found "that the jury may not have had an adequate explanation of the duty to warn imposed upon a seller in Louisiana." (R. 1765-71).

Arguing that the trial court abused its discretion granting the petitioner a new trial, Industrial filed a Motion to Amend the Interlocutory Order, requesting the trial court to amend its order to

certify the order for permissive appeal under 28 U.S.C.A. § 1292(b). The district court denied that motion. (R. 1738-40). Subsequently, a writ of mandamus was filed with the Fifth Circuit Court of Appeals, which was denied.

In preparation for the new trial, respondent timely filed a Motion for Summary Judgment on April 10, 1992, alleging that, under Louisiana law, Industrial was entitled to be dismissed from the suit under Rule 56 of the Federal Rules of Civil Procedure, in part, because Industrial did not breach any duty to warn of the ice auger's open and obvious danger. (R. 1671-94). The motion was noticed for hearing on April 29, 1992, at 10:00 a.m. (R. 1672). After petitioner's counsel failed to file an opposition as required under Uniform Local Rule 2.07E, the court reviewed the respondent's motion, found it to have merit, and granted the motion for summary judgment on April 22, 1992. (R. 1667-68).

Petitioner's counsel subsequently filed a Motion for Reconsideration on April 28, 1992, and, as requested by the trial court, included an opposition to the motion for summary judgment. (R. 1602). Industrial filed a timely opposition on May 4, 1992, urging that the petitioner was not entitled to reconsideration and that the motion for summary judgment was properly granted *on the merits*. (R. 1593). The trial court denied the petitioner's motion for reconsideration, finding that petitioner's counsel's excuse for failing to timely oppose the motion — that he was on a "combination vacation/brief-writing" trip — was not sufficient to warrant reconsideration. (R. 1570-73). Significantly, however, the court actually reconsidered the motion stating that it considered the "merits of the plaintiff's motion for reconsideration and, in an abundance of caution, again considers defendant's motion for summary judgment on the merits with the benefit of plaintiff's opposition." (R. 1569).

Further, in deciding to grant the motion for summary

judgment, the trial court noted that "[i]n granting a new trial, the court sought to correct what it perceived to be a manifest injustice from occurring by providing the plaintiff's counsel a second opportunity to prove liability against the remaining defendant." (R. 1575). However, the court "reluctantly [admitted] that a less impassioned review of the evidence in the matter does not support plaintiff's position." (R. 1580). Finding that the auger presented an open and obvious danger against which Industrial had no duty to warn, the trial court concluded that there was no material issue of fact in dispute to prevent summary judgment as a matter of law. Therefore, "even upon a consideration of defendant's motion on the merits," petitioner's counsel failed to bring forth any facts which would raise "a triable issue." (R. 1580). Thus, the court entered judgment in favor of Industrial.

To challenge the summary judgment, petitioner's counsel appealed the trial court's order denying the motion for reconsideration and affirming the summary judgment in favor of Industrial. (R. 1562). Industrial cross-appealed from the initial order granting a new trial following the jury's verdict in its favor. (R. 1560).

In a well-reasoned opinion dated June 15, 1993, the Fifth Circuit Court of Appeals reviewed Louisiana law on seller liability and concluded that the danger of the auger in this case was obvious, relieving Industrial of any duty to warn of dangers of which the user was or should have been aware. Since "Industrial's tort liability as the *seller* of the ice plant must arise, if at all, from its failure to warn of this dangerous condition", the court held that Industrial was "entitled to Judgment as a matter of law." *Kelley*, 992 F.2d at 1418 (emphasis in original).

Because the Fifth Circuit's decision accurately applies Louisiana law regarding the duties of a retailer seller, this Court should refuse to grant petitioner's Petition for Writ of Certiorari.

B. Statement of the Facts

On July 5, 1987, Jack Kelley was fatally injured as he was working at the Demere Ice Company's ice plant in Leeville, Louisiana. On the date of the accident, Jack Kelley and a co-worker were bagging ice at the ice plant. In an attempt to quickly get ice out of the ice storage bin, Mr. Kelley climbed into the ice storage bin through one of the service doors, disregarding his employer's orders never to enter the bin. (R. Vol. 10, pp. 180-181). While climbing into the bin, Mr. Kelley passed the bin's control panel. (R. Vol. 8, p. 50). However, he chose not to press the button to stop the auger. While inside the ice storage bin, Mr. Kelley became entangled in the ice auger that dispenses the ice into the ice conveyor.

Industrial acted as a broker in ordering specified ice-making equipment from Turbo Refrigeration Company and in ordering an ice storage bin from Price-Macemon/Rochester Silo, Inc. The orders were placed pursuant to a sales contract between Industrial and Delton Demere, dated January 5, 1987. Industrial never had physical possession of the equipment and had no control over the equipment or its design. In fact, Industrial did not select the individual components of the ice-making equipment. Instead, the components were selected by Preston Davis[2] and the Demere family. In fact, as David McGowan, Industrial's representative, testified, the sale to Delton Demere was the first time Industrial had sold an ice storage bin manufactured by Price-Macemon. (R. Vol. 10, pp. 281-284, 312).

Installation of the ice plant began in the spring of 1987. Pursuant to the terms of the sales contract, the Demeres were

---

2. Preston Davis selected the ice-making equipment and made the sale, placing the order through Industrial. (R. Vol. 7, p. 14). Preston Davis was not an authorized sales agent for Industrial, nor was he an employee. (R. Vol. 7, p. 8).

required to arrange for installation of the ice plant and for preparing the foundation. (R. Vol. 10, pp. 168-69). The ice storage bin was shipped directly from its manufacturer, Price-Macemon, to the site in Leeville. (R. Vol. 10, p. 291). Additionally, the manufacturer, Price-Macemon, supplied a supervisor to oversee the entire installation process and "make sure everything went the way they thought it should be." (Vol. 10, p. 237). Further, according to Damas Demere, the general manager of the ice plant, the representative of Price-Macemon was responsible for all safety devices. (R. Vol. 10, p. 199).

While the petitioner argues that Industrial should have supplied warning decals for placement on the ice storage bins, at no time prior to the accident, were limit switches or warning decals provided to Industrial by the manufacturer of the equipment. (Vol. 10, p. 303). In fact, Price-Macemon subsequently forwarded instructions for limit switches, limit switches themselves, safety decals, and instructions for locating the safety decals to Industrial on October 29, 1987, several months after the accident.

SUMMARY OF THE ARGUMENT

This Court should deny petitioner's Petition for Writ of Certiorari under Rule 10 of the Supreme Court Rules. The decision of the Fifth Circuit Court of Appeals applies Louisiana tort law and is not in conflict with the decisions of the Louisiana state courts. Further, the Fifth Circuit's opinion is not in conflict with decisions of this Court or of other federal circuit courts. Instead, the Fifth Circuit correctly applied the rules regarding summary judgment as established by this Court and developed by the circuit courts to affirm the trial court's summary judgment in favor of Industrial.

Further, the Fifth Circuit correctly applied Louisiana law which holds that a retail seller has no duty to warn of dangers which are open and obvious. While the petitioner argued that Louisiana

has rejected the open and obvious danger defense, that argument is unfounded. Further, petitioner confuses the burdens placed on a manufacturer and the test used to determine whether a product is defective with the burdens placed on a retail seller and the inquiry as to whether a duty to warn exists.

As the respondent argued in pre and post trial memoranda, in the Motion for Summary Judgment, and in its brief and reply brief to the Fifth Circuit, under Louisiana law, Industrial had no duty to warn Jack Kelley of the danger involved with the auger at issue since the danger was obvious. Therefore, this Court should refuse to exercise its supervisory review and deny petitioner's Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS, AFFIRMING SUMMARY JUDGMENT IN FAVOR OF INDUSTRIAL REFRIGERATED SYSTEMS, DOES NOT PRESENT ISSUES WARRANTING EXERCISE OF THIS COURT'S SUPERVISORY REVIEW SINCE THE DECISION IS NOT IN CONFLICT WITH THOSE OF OTHER CIRCUITS AND ACCURATELY APPLIES LOUISIANA LAW REGARDING THE DUTIES OF A RETAIL SELLER.

Under *Erie R.R. v. Tompkins*, 304 U.S. 64, 56 S. Ct. 817, 82 L. Ed. 1118 (1938), the district court and Fifth Circuit were obligated to apply "well-settled"[3] Louisiana law regarding the obligations of a *retail seller* where an individual is injured by the product sold.[4]

---

3. *Kelley*, 992 F.2d at 1414.

4. Since the actual manufacturer of the ice-making equipment was (Cont'd)

Since this case involves the application of "well-settled" Louisiana tort law, this Court should decline to exercise its supervisory jurisdiction and should deny petitioner's Petition for Writ of Certiorari under Rule 10 of the Supreme Court Rules. As noted by this Court, certiorari is used mainly to resolve conflicts among circuit courts and state courts regarding the interpretation of federal law. *Braxton v. United States,* 111 S. Ct. 1854, 114 L. Ed. 2d 385 (1991).

The Fifth Circuit's decision in this case correctly applied Louisiana law. In addition, the decision is not in conflict with the Louisiana Supreme Court. Instead, the decision follows a long line of Louisiana cases, including those of the Louisiana Supreme Court, which relieve a retail seller of the duty to warn where the danger associated with use of a product is obvious.[5]

Also, since the applicable substantive law in this case is Louisiana tort law, the decision is not in conflict with those of other circuits. However, to persuade this Court to exercise its discretionary jurisdiction, the petitioner argues that the Fifth Circuit erroneously affirmed the use of summary judgment in a product liability case. Further, petitioner argues that the decision to

---

(Cont'd)
bankrupt, at trial petitioner argued that Industrial should be treated as a manufacturer by claiming that Industrial was a "professional vendor." *See Chappuis v. Sears Roebuck & Co.,* 358 So. 2d 926, 930 (La. 1978). However, the jury concluded that Industrial should be treated as a *retail seller,* not as a manufacturer. Further, the district court granted a new trial on the sole issue of Industrial's liability as a *retail seller.* Thus, the issue of manufacturer's liability was not before the Fifth Circuit since that issue was not appealed by the petitioner.

5. *See Thornhill v. Black, Sivalls & Brison, Inc.,* 394 So. 2d 1189 (La. 1981); *Delanzo v. ABC Corp.,* 572 So. 2d 648 (La. App. 5th Cir. 1990); *American v. Duo Fast Dixie,* 367 So. 2d 415 (La. App. 4th Cir. 1979).

affirm the use of summary judgment is in conflict with decisions of this Court and other circuits.

That argument lacks merit. Instead, the Fifth Circuit correctly applied the guidelines developed by this Court and other federal courts in defining and applying the rules on summary judgment. *See* Section II, *infra.*

In addition, contrary to petitioner's argument, this case does not warrant consideration by this Court due to "societal" issues presented. While petitioner argues that affirming the decision in favor of Industrial will create a negative incentive for manufacturers,[6] the decision, limited to seller liability, does not affect a manufacturer's duty to develop a safe product. Instead, if the *manufacturer* of the equipment had been before the court, it is likely that it would have been liable for failing to include adequate safety devices.

Because the decision of the Fifth Circuit is in accordance with Louisiana tort law and does not abuse summary judgment procedure, this Court should refuse to exercise its discretionary review and deny petitioner's Petition for Writ of Certiorari. Further, while Mr. Kelley's death was indeed tragic, this case does not present issues of national concern sufficient to warrant granting petitioner's petition.

---

6. *See* petitioner's Petition for Writ of Certiorari at p. 10.

II.

THE FIFTH CIRCUIT CORRECTLY AFFIRMED THE TRIAL COURT'S SUMMARY JUDGMENT IN FAVOR OF RESPONDENT, INDUSTRIAL REFRIGERATED SYSTEMS, SINCE, AS A MATTER OF LAW, INDUSTRIAL REFRIGERATED SYSTEMS DID NOT HAVE A DUTY TO WARN JACK KELLEY REGARDING THE POTENTIAL DANGER OF THE ICE MACHINE AT ISSUE SINCE ANY DANGER PRESENTED BY THE ICE MACHINE'S AUGER WAS OPEN AND OBVIOUS.

A. Both the District Court and the Court of Appeals Properly Used Summary Judgment in this Case.

While the Fifth Circuit has stated that summary judgment is not always appropriate in negligence or product liability cases, the court has recognized circumstances in which summary judgment might appropriately dispose of a negligence or product liability action. Specifically, the Fifth Circuit has instructed that summary judgment is appropriate where the resolution of the summary judgment motion turns upon *legal issues*, and not factual issues. *Trevino v. Yamaha Motor Corp.*, 882 F.2d 182, 184 (5th Cir. 1989).

The petitioner correctly argues that summary judgment may not be appropriate in a product liability case where the court is charged with determining whether a manufacturer created a product with a design defect since that inquiry requires a risk-utility balancing test. *See Davidson v. Stanadyne, Inc.*, 718 F. 2d 1334, 1339 (5th Cir. 1983) (applying Texas law). However, determining whether a retail seller is charged with the duty to warn, presents a wholly separate inquiry. Determining whether the duty to warn exists and defining it are *legal questions* which should be answered by the trial judge. *Harris v. Pizza Hut*, 455 So. 2d 1364, 1371 (La. 1984); *Putman v. Gulf States Utilities*, 588 So. 2d 1223, 1228 n. 5 (La. App. 1st Cir. 1991).

In answering the legal question presented, the Fifth Circuit accurately applied the standards regarding summary judgment as set forth by this Court. First, the Fifth Circuit noted that in reviewing the district court's grant of summary judgment, it should examine the record *de novo. Kelley,* 992 F.2d at 1413 (citing, *Walker v. Sears, Roebuck & Co.,* 853 F.2d 355, 358 (5th Cir. 1988)). Also, the court cited the well-established rule that summary judgment is proper only if the record discloses that there is no genuine issue as to any material fact and that Industrial is entitled to judgment as a matter of law. *Id.* (citing, Fed. R. Civ. Proc. 56(c)). Further, the court examined the record and viewed the evidence and all justifiable inferences drawn from that evidence in the light most favorable to petitioner. *Id.* (citing, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S. Ct. 2501, 2513-14, 91 L. Ed. 2d 202 (1986); *Reid v. State Farm Mut. Auto Ins. Co.,* 784 F.2d 577, 578 (5th Cir. 1986)). Thus, the court found that if the record, viewed in the light most favorable to petitioner, could not lead a rational trier of fact to find for petitioner, there was no genuine issue for trial, and summary judgment was proper. *Id.* (citing, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 578, 106 S. Ct. 1348, 1351, 89 L. Ed. 2d 538 (1986); *Lavespere v. Niagara Mach. & Tool Works,* 910 F.2d 167, 178 (5th Cir. 1990)).

Further, the Fifth Circuit correctly noted that Industrial had the burden of informing the court of the basis for its motion and in identifying the pleadings and other evidence which it believed demonstrated the absence of a genuine issue of material fact. *Id.* (citing, *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986); *Lavespere,* 910 F.2d at 178)).

Contrary to petitioner's representation in its Petition for Certiorari, Industrial did not merely present the single Affidavit of David McGowan in support of its motion. Instead, Industrial argued that it had no legal duty to warn Jack Kelley of the auger's

obvious danger and, in support, pointed the court to the trial testimony of David McGowan, Damas Demere, Delton Demere, David Easley, and Steven Fillimich in support of the contention that the auger's danger was obvious to the ordinary user. (R. 1684-85). Industrial further cited the trial court to extensive case law regarding the duty to warn and to cases holding that the danger of an auger is obvious. *Thornhill,* 385 So. 2d at 338; *Melton v. Deere & Co.,* 887 F.2d 1241 (5th Cir. 1989).

Then, as the Fifth Circuit instructed, it became incumbent on the petitioner to submit affidavits or refer to the record to designate specific facts showing that there was a genuine issue for trial. *Id.* (citing, *Lavespere,* 910 F.2d at 178).

In opposing the motion for summary judgment, the petitioner failed to make any references to the record other than to cite the trial judge's earlier rulings. Instead, petitioner argued that the "law of the case doctrine" precluded summary judgment. Further, petitioner argued that in his earlier rulings, the district judge found that summary judgment was inappropriate. (*See* Petitioner's Appendix I, A-81-87).

In rejecting petitioner's arguments, the trial court noted that the law of the case doctrine did not apply since no decision had been rendered by an appellate court. (R. 1577). Additionally, the trial judge instructed that Rule 54(b) of the Federal Rules of Civil Procedure permitted him to revise his previous rulings. Also, the trial court noted that the respondent's motion for summary judgment was presented in a different context since the jury found that Industrial was not a manufacturer, but was a retail seller. (R. 1578-79). In short, the court found "no support in the record (*and plaintiff's counsel presents none*) for its previous position that . . . the auger did not present an open and obvious danger as a matter of law." (R. 1579-80) (footnote omitted and emphasis added). Thus, petitioner's counsel failed to raise a triable issue of fact. (R. 1580).

After requiring Industrial to show that there was no issue of fact upon which a reasonable jury could rule in favor of petitioner, the Fifth Circuit correctly shifted the burden to the petitioner to show specific facts in the record which would support the conclusion that a genuine issue existed for trial. Since the principles regarding summary judgment and the burdens assigned to each party were correctly set forth by the court, the Fifth Circuit did not contradict the decisions of this Court or other circuit courts. Further, since the issue before the court was a legal one, *i.e.*, whether a duty existed, summary judgment was appropriate.

B. As a Retail Seller, Industrial Had No Duty to Warn Jack Kelley of the Auger's Obvious Danger.

The Fifth Circuit correctly noted that, under Louisiana law, a manufacturer of a product that is defective or unreasonably dangerous may be held strictly liable. *Kelley*, 992 F.2d at 1413 (citing, *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 113 (La. 1986)). However, in contrast, the non-manufacturer seller of a product may be held liable only for its negligent failure to warn consumers of the dangerous propensities of the product it sells.[7] Louisiana courts have consistently held that a seller's duty to warn extends only to dangers which are not obvious. The seller has no duty to warn of dangers of which the user is or should be aware.[8]

---

7. While petitioner complains that the Fifth Circuit cited *Hopper v. Crown*, 555 So. 2d 46 (La. App. 1st Cir. 1989), *rev'd*, 558 So. 2d 1117 (La. 1990), the rule regarding seller's liability is firmly established. La. Civ. Code art. 2545; *Spillers v. Montgomery Ward & Co.*, 294 So. 2d 803 (La. 1974); *Nelton v. Astro-Lounger Manufacturing Co.*, 542 So. 2d 128 (La. App. 1st Cir. 1989); *Harris*, 428 So. 2d at 1043.

8. *Delanzo*, 572 So. 2d at 651; *Hopper*, 555 So. 2d at 49; *American*, 367 So. 2d at 417; *see also, Halphen*, 484 So. 2d at 155 (limiting the duty of a *manufacturer* to warn of dangers which are not within the knowledge of or obvious to the user); *Home Ins. Co. v. National Tea Co.*, 577 So. 2d 65, 73-74 (La. App. 1st Cir. 1990), *aff'd in part, rev'd in part on other grounds*, 588 So. 2d 361

(Cont'd)

In arguing that Louisiana has rejected the open and obvious danger defense, petitioner misstates Louisiana law.[9] In fact, when the legislature codified Louisiana product liability law in the Louisiana Product Liability Act, he legislature retained the defense and instructed that a manufacturer is not required to provide a warning about a product where the user already knows or reasonably should know of the danger. La. R.S. 9:2800.57(B)(2) (West 1991)[10].

Additionally, while petitioner argues that the defense was eliminated when the Louisiana Supreme Court reversed *Hopper v. Crown*, the concurring opinion of Justice Lemmon did, in fact, recognize the defense. In the only opinion provided, Justice Lemmon stated that "the seller might still prevail if the defect was obvious to the ordinary user." *Hopper v. Crown*, 558 So. 2d 1117 (La. 1990) (Lemmon, J. concurring).

(Cont'd)
(La. 1991); *LeBleu v. Home Light Div. of Textron, Inc.*, 509 So. 2d 563, 565 (La. App. 3d Cir. 1987); *Decote v. Liberty Mut. Ins. Co.*, 451 So. 2d 1211, 1213 (La. App. 4th Cir. 1984), *writ denied*, 457 So. 2d 15 (La. 1984); *Lovell v. Earl Grissmer Co.*, 422 So. 2d 1344, 1350 (La. App. 1st Cir. 1982), *writ denied*, 427 So. 2d 871 (La. 1983); *Thornhill*, 385 So. 2d at 338.

9. In this diversity action, it is irrelevant if Colorado and Mississippi have rejected the defense. Louisiana law applies. Nonetheless, petitioner's interpretation of *Sperry-New Holland v. Prestage*, 617 So. 2d 248 (Miss. 1993) is misleading. In *Sperry*, the Mississippi Supreme Court discussed the potential strict liability of a manufacturer and determined that a risk-utility test should apply. Louisiana has consistently applied a risk-utility test in determining whether a manufacturer's product is defective. *Halphen*, 484 So. 2d at 115. However, the duty to warn inquiry as it relates to a retail seller is completely distinct.

10. The LPLA became effective on September 1, 1988. La. R.S. 9:2800.51, *et seq.* (West 1991).

Further, the Louisiana courts have continued to apply the defense as recently as July 2, 1993. In *Johnson v. Hartford Ins. Co.*, 623 So. 2d 35 (La. App. 1st Cir. 1993), the First Circuit affirmed a directed verdict in favor of an automobile manufacturer in *Johnson*, the petitioner was injured when he placed his hand into the wheel well of a car with the engine running. *Id.* at 36. In finding in favor of General Motors, the court noted that "[i]t is well established, however, the duty to warn does not include dangers which are obvious to the ordinary user." *Id.* at 37 (citing, *Winterrowd v. Travelers Indem. Co.*, 462 So. 2d 639, 642 (La. 1985)).

Petitioner also erroneously relies on *Putman v. Gulf States Utilities*, 588 So. 2d 1223 (La. App. 1st Cir. 1991) for the proposition that Louisiana "simply does not recognize the 'open and obvious' danger rule as a bar."[11] Instead, *Putman* actually supports Industrial's position. In *Putman*, the First Circuit affirmed summary judgment in favor of the defendant, finding that the defendant had no duty to warn of the obvious danger associated with bringing a mop in contact with high voltage electrical power lines. *Id.* at 1229.

While it is true that the open and obvious danger rule is not a bar to a strict liability claim against a manufacturer, the open and obvious danger rule does apply to eliminate the duty to warn. The

---

11. *See* petitioner's petition at p. 18. While Louisiana recognizes comparative fault as opposed to contributory negligence, that concept is not in conflict with holding that a seller has no duty to warn of a danger which should be obvious to an ordinary user. In assigning comparative fault, the trier of fact would focus on Mr. Kelley's actions or inactions. In defining a legal duty, the court should focus on the product at issue and any danger associated with it. Then, the court determines whether the danger should be obvious to an ordinary user. If so, the defendant has no duty to warn. Further, Louisiana has continuously applied the open and obvious danger rule after it adopted the doctrine of comparative fault in 1979. *See* Note 8.

inquiries are distinct. A manufacturer can be held liable in a product liability case under several theories — where a product is unreasonably dangerous per se (if the danger-in-fact outweighs the utility of the product), where a product is unreasonably dangerous in construction, or where the manufacturer fails to provide an adequate warning of a danger inherent in the normal use of the product. *Halphen*, 484 So. 2d at 114-15. In Louisiana, the open and obvious danger rule comes into play only under the third theory of recovery, failure to warn. *Id.* at 115. A manufacturer has a duty to warn only of dangers "not within the knowledge of or obvious to the ordinary user." *Id.* Since a retail seller's potential liability is limited to the duty to warn, the open and obvious danger rule applies.

In short, the Fifth Circuit correctly applied Louisiana law in answering the legal question of whether a duty to warn existed. The court correctly answered the question, finding that the danger of the auger was obvious. In doing so, the Fifth Circuit cited its earlier opinion in *Melton v. Deere & Co.*, where the court found that the danger of an auger was common sense. *Melton*, 887 F.2d at 1244.[12] Further, the court found that after a careful review of the record, viewing the testimony in the light most favorable to the plaintiff, no rational trier of fact could find in favor of the plaintiff on the issue of the auger's danger. *Kelley*, 992 F.2d at 1418. Because the record did not disclose a genuine issue of fact regarding the obvious nature of the auger's danger, summary judgment was appropriate. Industrial had no duty to warn.

---

12. *Melton* was cited for the proposition that the danger presented by an auger is common sense. It is irrelevant that Mississippi embraced the risk-utility analysis after *Melton* was decided. That analysis does not affect the duty to warn inquiry.

CONCLUSION

Since the case presents issues of well-settled Louisiana tort law, this Court should refuse to exercise its discretionary jurisdiction. The Fifth Circuit correctly applied the principles regarding summary judgment as developed by this Court and the other circuits. In doing so, the court reviewed a consistent line of Louisiana cases and found for Industrial. That decision should not be disturbed.

Respectfully submitted,

CLAUDE D. VASSER
Counsel of Record
C. DAVID VASSER, JR.
LEIGH ANN SCHELL
VASSER & VASSER
Attorneys for Respondent
2030 Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
(504) 523-6477

Supreme Court, U.S.
FILED
DEC - 7 1993
OFFICE OF THE CLERK

NO. 93-675

In the Supreme Court of the United States

OCTOBER TERM, 1993

CYNTHIA KELLEY, INDIVIDUALLY
AND ON BEHALF OF HER MINOR CHILDREN
JERRED SETH KELLEY AND
CINDY LYNN KELLEY
PETITIONERS

versus

INDUSTRIAL REFRIGERATED SYSTEMS, INC.,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

HENRY L. KLEIN, ESQ.
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

Attorney for
Petitioners-Applicants

OF COUNSEL:
HEISLER & WYSOCKI

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

TABLE OF CONTENTS

Page

Appendix L A-1

Appendix M A-12

Appendix N A-16

APPENDIX L

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CYNTHIA ANN KEEELY, ET AL	*	CIVIL ACTION
VERSUS	*	NO. 88-2862
PRICE-MACEMON, INC., ET AL	*	SECTION "K"

* * * * * * * * * * * * * * * * * * *

FILED
APR 11 9:25 AM 91

PRE-TRIAL MEMORANDUM REGARDING THE APPLICATION OF THE *"JET WHEEL DOCTRINE"* AND IN SUPPORT OF IN LIMINE MOTION TO STRIKE DEFENSES

MAY IT PLEASE THE COURT:

This pre-trial memorandum is devoted solely to the question of whether or not the "*Jet Wheel Doctrine*" is applicable, as enunciated by the Fifth Circuit Court of Appeals in the matters of *Bell v. Jet Wheet Blast, Division of Ervin Industries,* 709 F.2d 6 (5th Cir., 1983), Certified to the Louisiana State Supreme Court at 717 F.2d 181 (5th Cir.,1983), Rendered 755 F.2d 1146 (5th Cir., 1985), and as

enunciated, on certification by the Louisiana State Supreme Court, in *Bell v. Jet Wheel Blast, Division of Ervin Industries,* 462 So.2d 166 (1985), copies of which are annexed hereto for the convenience of the Court.

Because this case involves a hazard so devastating, so capable of mutilation, and so unforgiving, we believe it is one of those cases to which the "*Jet Wheel Doctrine*" applies, and as to which defenses based on "victim fault" are simply not available.

We therefore move, *in lime,* to strike all defenses alleging "victim fault", including contributory, negligence, comparative negligence and assumption of risk.

1. The Holding of the *"Jet Wheel Doctrine",* simply stated, the "*Jet Wheel Doctrine*" recognizes that in products case, where strict liability theories apply,[1] Louisiana does *not* recognize contributory negligence as a defense. See Also, *Products Liability,* 85 West's Federal Practice Digest 3rd, 94 and 95, annexed hereto, and cases cited therein: *Lewis v. Timco, Inc.,* 697 F.2d 1252, on rehearing 716 F.2d 1425[2] on remand 736 F.2d 163, rehearing denied 744 F.2d 94 and *Timco, Inc. v. Joy Mfg.,* 744 F.2d 94;

---

[1] See discussion of Industrial's liability under 402A of the Restatement of Torts 2nd., *infra.*

[2] On rehearing *en banc,* the entire Court struggled with the issue, and, noting that it had certified the question to the Louisiana Supreme Court in *Bell v. Jet Wheel, supra,* the Fifth Circuit nevertheless held, by a vote of 11 to 3, that comparative negligence *was* available as a defense to a products liability case, where such application would "...not frustrate a dedicated policy of Louisiana..." 716 F.2d 1425 at 1432.

Ashland Oil, Inc. v. Miller Oil Purchasing Co., 678 F.2d 1293; *Alford v. Pool Offshore Co.*, 661 F.2d 43; *LeBoeuf v. Goodyear Tire & Rubber Co.*, 623 F.2d 985; *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537, certiorari denied 101 S.Ct. 923, 449 U.S. 1113, 66 L.Ed.2d 842; *Khoder v. AMF, Inc.*, 539 F.2d 1078.

Because contributory negligence is not available, the defense typically raised in a dangerous or defective product case is the defense of "assumption of risk", which carries a higher burden of proof, as clearly held by the 5th Circuit in the first[3] *Jet Wheel* decision:

> [1] It is well established in Louisiana law that contributory negligence is not a defense to strict liability. *Langlois v. Allied Chemical, Inc.*, 258 La.1067, 249 So.2d 133, 140 (1971). Appellant relies upon the citation of several intermediate appeals decisions in Louisiana courts which if taken out of context seem to equate assumption of risk with contributory neglignece. The distinction, however, is clearly analyzed and explained by our brother Tate, a distinguished Louisiana jurist, who discusses the issue thoroughly in *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537 (5th Cir. 1980). *That case points out that assumption of risk involves "first, knowledge and appreciaation of a danger, and second, a voluntary encountering*

(Footnote 2 continued)

Timco, , however, was decided September 27, 1983 and the Louisiana Supreme Court decision in *Jet Wheel* was decided January 14, 1985.

[3] 709 F.2d 6, at 7.

> of it." ***In contrast, "The essence of contributory negligence is simply carelessness."*** Id. at 539, quoting Crowe, The Anatomy of a Tory, 22 Loyola L.Rev. 903, 915 (1976).
>
> (Emphasis Ours)

But even "assumption of risk", is not automatically available. The teaching of the "*Jet Wheel Doctrine*" is that assumption of risk, pleaded *sub nomine* "comparative negligence", is *not* available in cases where the use of the defense results in the reduction of a manufacturer or seller's "...incentive to make a safer product..." 462 So.2d at 172.

In *Jet Wheel, supra*, the plaintiff was injured when his hand was caught in the chain and sprocket drive of a conveyor system of the machine because "...of the lack of an adequate guard at the particular place on the drive where the injury occurred..." 462 So.2d. at 172.

The Court held that neither contributory negligence *nor* assumption of risk applied, because of the social need *not* to allow suppliers of defective products to profit from user inadvertence. The Supreme Court's words begin at 171, thus:

> "The recovery of a plaintiff who has been injured by a defective product *should not be reduced*, however, *in those type of cases* in which it does not serve realistically to promote careful use or where it drastically *reduces the manufacturer's incentive to make a safer product.*

We believe this is such a case. The lethality of the

auger in question does not justify the imposition of any "user responsibility". As the Supreme Court said, at 172:

> "...the law does not accept the employee's ability to take care of himself *as an adequate safeguard of interests which society seeks to protect.*"

Thus, the doctrine stands for the proposition that, *in certain cases,* no diminution by way of "victim fault" is allowed. This decision must be made on a case-by-case basis, by the Court.

Not by a jury.

We believe this is such a case, and therefore move, *in limine,* to strike all defenses based on victim fault, whether couched in terms of negligence or assumption or risk.

In connection with the question of lethality, and in order that the Court can be apprised of the social issues involved, as is required by the "*Jet Wheel Doctrine*" we annex hereto a copy of the report of J.B. Sevart, P.E., including two papers presented to the American Society of Agricultural Engineers, given long before this accident occurred, entitled *Application of Interlocks, Deadman Controls and Emergency Stop Devices as Design Strategy to Reduce Risk Associated with Agricultural Machinery* (March 19, 1982, and *Reducing Risk of Bottom Unloaders by Control System Design* (April 12, 1985).

After noting that Agriculture is the most dangerous occupation in the United States, as measured by the National Safety Council's 1981 edition of "Accident Facts",

Mr. Sevart notes:

> "It is most foreseeable that boredom, fatigue, worry, inexperience, and a host of other factors deny the existence of a perfect operator. Further, what control does the machine designer have over the operator? When a designer assumes conditions which are not true, failure of the design will occur and serious injury is foreseeable." March 19, 1982 at Page 3.

Given that the "system" was sold to a user in humid, hot South Louisiana, the foreseeability that an operator would be required to enter the silo to "unfreeze" ice was high indeed. After all, it was Industrial which selected a silo from Rochester, which, although insulated adequately, was not refrigerated.

This is not a case where the component parts failed, but rather a case in which the "system" (which Industrial Refrigerated Systems, Inc. provided) failed.

What might have worked in upper New York State didn't work on Bayou Lafourche.

That was foreseeable.

2. Industrial's Posture: Seller, manufacturer, or Supplier.[4] Industrial says it was a "broker"[5] which merely

---

[4] In order to properly decide whether or not the *"Jet Wheel Doctrine"* applies, it is necessary to analyze Industrial's posture in the case.

[5] Paragraph 6(b), pre-trial order.

"supplied" the component parts which made up the "system" it sold to the Demere family and their respective corporations.

Because most cases involve manufacturers, it is therefore important and relevant to analyze Industrial's posture in this litigation.

Clearly, Industrial did not manufacture any of the component parts. Rather, it assembled refrigeration systems, or "Ice Plants". It's letterhead boasts:

"Ammonia & Freon Refrigeration Specialists"

And indeed what Industrial supplied was a turn-key "system". That's why they put the work in their name: Industrial Refrigerated **Systems.**

As Mr. Wayland Demere put it, at p. 24 of his deposition:

"And they made it sound so good. Just sit in a chair and press a button and everything was going to work perfect."

At the January 5, 1987 meeting about which Mr. Demere spoke, Industrial received a check for $50,000, payable to Industrial Refrigerated Systems. On April 20, 1987, the South LaFourche Bank & Trust Company wired $202,000 to the account of "Industrial Refrigerated Systems" at the FNBC. (Copy annexed).

Having received the pu.chase money and having

supplied a complete system, there is no doubt that Industrial was a "supplier of chattels". By its own pleadings, Industrial was certainly a "seller". And because of the representations made at the January 5, 1987 meeting, Industrial can be held accountable as a "manufacturer". Under any of the above categories, we believe, the "*Jet Wheel Doctrine*" applies.

The appropriate rules for determining the liability of Industrial are contained in Chapter 14 of the Restatement of Torts 2nd, entitled *Suppliers of Chattels,* which provide as follows:

> **§400. Selling as Own Product Chattel Made by Another**
>
> One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."

It will, of course, be left to the jury to decide whether, under the circumstances of this case, Industrial represented the "system" as its own product. Clearly, Industrial presented itself as a refrigeration "specialist" capable of putting together a "refrigeration system". Clearly, Industrial asembled and supplied the component parts.

The jury will have evidence before it to justify a finding that Industrial must respond as a manufacturer, in which case it will be held strictly liable for the death of Jack Kelley.

If the representations made on January 5, 1987, do not result in a finding that Industrial stands in the shoes of a manufacturer, then Industrial is a seller, whose liability is determined pursuant to Section 402 A of the Restatement of Torts, which provides as follows:

> **§402 A. Special Liability of Seller of Product for Physical Harm to User or Consumer**
>
> (1) One who sells any product *in a defective condition unreasonably dangerous to the user* or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) the rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

As the testimony of Mr. Sevart will show, the Orbital Ice Storage System manufactured by Rochester-Silo was defectively designed.

Thus Industrial is strictly liable as the "seller" of a defective product, particularly in view of the fact that In-

dustsrial was "...engaged in the business of selling such a product..."

The Louisiana Supreme Court, in deciding the certified question, at 462 So.2d 171, recognized the applicability of Section 402 A of the Restatement of Torts 2nd, as well as the need for a rule of strict liability, holding:

> "As were most American courts, we were influenced in our objective search for a products liability rule by the doctrine that culminated in the adoption of Section 402A of the Restatement Second of the Law of Torts, which has received a wide national acceptance. The basic goals of the strict products liability doctrine appear to be: (a) the reduction of the incidence of injuries by providing an incentive for manufacturers to produce safer products; (b) the placing of the burden of accidental injuries caused by defective products on those who market them, to be treated as a cost of production against which liability insurance can be obtained."

The criteria set forth by the Louisiana Supreme Court, pursuant to the certification of the Fifth Circuit Court of Appeals, requires that, under the facts of this case, the *Jet Wheel Doctrine*" must be applied.

Accordingly, the question of "victim fault" should not go to the jury and the defenses should be stricken.

Respectfully submitted,

/s/ Henry L. Klein

HENRY L. KLEIN (#7440)
844 Baronne Street
New Orleans, LA 70113-1103
(504) 561-1177

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record by depositing same into the United States Mail, properly addressed and postage prepaid on this 1st day of March, 1991.

/s/ Henry L. Klein

APPENDIX M

MINUTE ENTRY
ARCENEAUX, J.
MAY 20, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CYNTHIA ANN KEEELY, ET AL	**CIVIL ACTION**
VERSUS	**NO. 88-2862**
PRICE-MACEMON, INC., ET AL	**SECTION "K" (1)**

FILED
MAY 11 4:49PM '91

Plaintiffs filed a pre-trial motion in the above-captioned matter and requested that the Court strike defenses alleging "victim fault," including contributory negligence, comparative negligence, and assumption of risk. In an opposition filed by defendant Industrial Refrigerated Systems, Inc. ("Industrial"), this defendant argues that the Court should deny plaintiffs' motion in its entirety. Having reviewed the plaintiffs' support, the opposition filed by Industrial, and the applicable law, the Court, however, finds the motion to have some merit.

DATE OF ENTRY MAY 20 1991

Plaintiffs based this motion on the Supreme Court of Louisiana's decision in *Bell v. Jet Wheel Blast,* 462 So. 2d 166 (La. 1985), in which that court answered a question of law certified to it by the U.S. Court of Appeals for the Fifth Circuit. *See Bell v. Jet Wheel Blast,* 717 F.2d 181 (5th Cir. 1983). More specifically, the Fifth Circuit posed the following question: "Does the Louisiana Civil Code permit the defense known as contributory negligence to be advanced to defeat or mitigate a claim of strict liability based upon a defective product, the theory of liability commonly known as 'product liability'?" *Id.* at 183. The Supreme Court of Louisiana answered this question in the negative but noted that the application of comparative negligence may be appropriate in some cases. *Bell,* 462 So. 2d at 173; *see Bell v. Jet Wheel Blast,* 755 F.2d 1146, 1148 (5th Cir. 1985). This holding developed into the theory of law known commonly as the "*Jet Wheel* Doctrine" in Louisiana jurisprudence.

Plaintiffs seek application of the "*Jet Wheel* Doctrine" to preclude any defenses alleging contributory negligence, comparative negligence, and/or assumption of risk. The Court finds plaintiffs' argument with respect to contributory negligence to fall within the "*Jet Wheel* Doctrine." Thus, as a matter of law, the defense of contributory negligence will not be permitted to the extent that this cause of action lies in strict liability.

The Court, however, must reserve judgment on the defenses of comparative negligence and/or assumption of risk. The Supreme Court of Louisiana in *Bell* noted that "the question of whether other classes of cases fall within the category to which comparative fault may apply must

be decided on a case-by-case basis." 462 So. 2d at 172. Defendant Industrial relies much on the fact that the plaintiff in *Bell* performed "a repetitive operation with a defective industrial machine as required by his employer." *Id.* According to Industrial, the *Bell* holding has not been applied beyond its facts.

The Court, however, finds Industrial's assertion to be a misreading of the law on this issue. In precluding the application of comparative negligence in certain strict liability cases, the Supreme Court of Louisiana in *Bell* noted the policy goal to promote the manufacturing of safer products. *Id* In fact, the Fifth Circuit has held recently that "it is error to assume that *Bell* gives repetitive motion a talismanic effect in the comparative fault determination." *Cates v. Sears, Roebuck & Co.*, 928 F.2d 679, 683 (5th Cir. 1991). The court further stated that such determination must be made "on a flexible case-by-case basis and not pursuant to a rigid checklist." *Id.* Based on these pronouncements and the evidence before the Court at this time, this Court finds defendant Industrial's arguments to be unpersuasive but does not stand ready to rule on this issue without a fuller presentation of the facts.

The Court, in conclusion, finds that plaintiffs' motion presents a persuasive case for striking defenses relating to "victim fault." Accordingly,

IT IS ORDERED that plaintiffs' motion to strike any defense asserting contributory negligence insofar as it relates to a cause of action based in strict liability is hereby **GRANTED**. The Court reserves judgment on the defenses of comparative negligence and/or assumption of risk.

/s/ George Arceneaux, Jr.

APPENDIX N

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

NO. 92-3511

CYNTHIA KELLEY, individually
and on behalf of her minor children
JERRED SETH KELLEY and CINDY LYNN KELLEY

Plaintiff - Appellant

VERSUS

INDUSTRIAL REFRIGERATED SYSTEMS, INC.

Defendant - Appellee

Appeal from the United States District Court
Eastern District of Louisiana
No. 88-2862, Section "K"
Honorable George Arceneaux, Jr., Judge Presiding

PETITION FOR AND/OR SUGGESTION
OF EN BANC CONSIDERATION
OF APPELLANT
Cynthia Kelley, individually
and on behalf of her minor children
Jarred Seth Kelley and Cindy Lynn Kelley

SUBMITTED BY:

HENRY L. KLEIN, ESQ. (#7440)
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

Attorney for Cynthia Kelley

OF COUNSEL:
HEISLER & WYSOCKI

TABLE OF CONTENTS

PAGE:

Table of Contents i

Certificate of Interested Parties ii

Statement of Counsel iii

Table of Authorities iv

APPLICATION FOR EN BANC CONSIDERATION

1. Statement of Issues Which Merit En Banc Consideration

(a) Uniformity of Decisions 1

(b) Questions of Exceptional Importance . . . 1

2. Statement of the Course of Proceedings and Disposition of the Case 3

3. Statement of Facts Necessary to Argument of the Issues 5

4. Argument and Law 11

5. Conclusion 15

6. Certificate of Service 16

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Ms. Cynthia Kelley
P. O. Box 12
Fort McCoy, Florida 32134

Industrial Refrigerated Systems, Inc.
1411 South Houston Road
Pasadena, Texas 77502

Rochester Silo Industries
a/k/a RSI Industries, Inc.
7010 Dresser Drive N.E.
Rochester, Minnesota 55904

Truck Insurance Exchange
P.O. Box 6386
Beaumont, Texas 77705

Mr. David McGowan and
Ms. Linda McGowan
1411 South Houston Road
Pasadena, Texas 77502

CERTIFICATE OF INTERESTED PERSONS
(continued)

Claude E. Vassesr, Esq.
601 Poydras Street, Suite 2030
New Orleans, LA 70130

Henry L. Klein, Esq.
844 Baronne Street
New Orleans, LA 70113-1103

HEISLER & WYSOCKI
844 Baronne Street
New Orleans LA 70113-1103

Respectfully submitted:

HENRY L. KLEIN, ESQ. (#7440)
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971
Attorney for Cynthia Kelley

OF COUNSEL:

HEISLER & WYSOCKI

STATEMENT OF COUNSEL

1. I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Court of Appeals for the Fifth Circuit and the Supreme Court, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court:

(a) *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

(b) *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167 (5th Cir. 1990).

(c) *Little v. Liquid Air*, 952 F.2d 841 (5th Cir. 1992), *en banc rehearing pending.*

2. I also express a belief based on reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance:

(a) Those issues presently before the en banc panel in *Little v. Liquid Air, supra*, including the applicability of the "sophisticated user" rule, the applicability of the "risk/utility" doctrine, and the applicability of the "obvious danger" rule as a bar to recovery in a state which has adopted comparative negligence.

(b) The applicability of the"Jet Wheel Blast" doctrine to machinery *nationally* renowned for its lethality.

(c) The granting of a summary judgment on grounds *not* included in the mover's statement of uncontested facts.

HENRY L. KLEIN, ESQ.

TABLE OF AUTHORITIES

PAGE:

Bell v. Jet Wheel Blast, Division of Ervin Industries, 462 So.2d 166 (1985) 3

Celotex v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) 13

Davis v. Avondale Industries, Inc., 975 F.2d 169 (5th Cir. 1992) 2

Easton v. Chevron, 602 So.2d 1032 (4th Cir. 1991) 9

Lavespere v. Niagara Machine & Tool Works, Inc., 910 F.2d 167 (5th Cir. 1990) 1

Little v. Liquid Air Corp., 952 F.2d 841 (5th Cir., 1992) 1

Melton v. Deere & Co., 987 F.2d 1241 (5th Cir., 1989) 12

U.S. v. Lynch, 690 F.2d 213 (1982, U.S. App. D.C.) 2

1. Statement of Issues Which Merit En Banc Consideration.

(a) Uniformity of Decisions. In this products' liability case, the panel has affirmed a summary judgment on the issue of "open and obvious" danger, notwithstanding established precedent against deciding such fact issues by summary judgment. For reasons set forth hereinbelow, we believe that the panel decision is inconsistent with previous rulings by this Court in *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167 (5th Cir. 1990) and *Little v. Liquid Air,* 952 F.2d 841 (5th Cir. 1992), *en banc rehearing pending.*

Additionally, because the mover did *not* certify the issue of "open and obvious" danger in its Rule 2.09 Statement of Uncontested facts, the mover did not bear its threshold burden as required by *Celotex v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) and its considerable progeny. to the best of our knowledge, no Fifth Circuit decision has ever allowed a fact issue *not set forth in the Rule 2.09 Certificate* to be "supplied" by the Court. Uniformity requires that a non-mover to a summary judgment be put on *clear notice* as to what fact issues are "uncontested".

(b) Questions of Exceptional Importance. We have closely monitored *Little v. Liquid Air* since it was argued before an *en banc* panel in May of 1992. The case at bar, like *Little v. Liquid Air,* would involve (had the issue been properly certified as required by Local Rule 2.09) the "sophisticated user" rule, and the applicability of the "risk/utility" doctrine. Although *Little v. Liquid Air* is a

Mississippi case, Louisiana recognizes the "sophisticated user" doctrine. *Davis v. Avondale Industries*, 975 F.2d 169 (5th Cir. 1992). The "risk/utility" doctrine is quickly becoming the nationally accepted test in products' liability cases and requires the weighing of competing facts. As the panel correctly noted at footnote 11:

> 'Although the tension between Louisiana's new pure comparative fault system and the "obvious danger rule" is clear, to date, *no Louisiana court has directly addressed the issue.*"

This is correct and warrants en banc consideration.

Secondly, the lethality of screw-type augers is a matter of national concern. We believe that the "Jet Wheel" doctrine applied and so moved, *in limine*. The District Court granted the motion but the Court of Appeals did not deal with the issue because if affirmed summary judgment. We believe that the application of the "Jet Wheel" doctrine to machinery as lethal as the auger involved herein is a matter of exceptional *societal* importance.

Finally, en banc review is available to consider an unusual case in order to cure a "gross injustice". *U.S. V. Lynch*, 690 F.2d 213 (1982, U.S. App. D.C.). This motion for summary judgment was affirmed on grounds not included in the mover's statement of uncontested facts.

2. Course of Proceedings and Disposition of the Case. On July 5, 1987, Jack Kelley was mangled to death by a screw auger at an ice plant in Golden Meadow, Louisiana. As a consequence, on July 1, 1988, Cynthia Kelley, individually and on behalf of her minor children, Jerred

Seth Kelley and Cindy Lynn Kelley, filed suit against various defendants, including Industrial Refrigerated Systems, Inc., the seller of the system and its components.

On April 11, 1991, plaintiff filed an *in limine* motion to strike defenses regarding "victim fault", pursuant to the Jet Wheel Doctrine", *Bell v. Jet Wheel Blast, Division of Ervin Industries,* 462 So.2d 166 (1985), (Excerpt 2) and on May 17, 1991, the District Court GRANTED the motion with the following language:

> "The Court, in conclusion, finds that plaintiffs' motion presents a persuasive case for striking defenses relating to "victim fault." Accordingly,
>
> **IT IS ORDERED** that plaintiffs' motion to strike any defense asserting contributory negligence insofar as it relates to a cause of action based in strict liability is hereby **GRANTED**. The Court reserves judgment on the defenses of comparative negligence and/or assumption of risk."

Trial began October 7, 1991, resulting in a jury verdict in favor of Industrial as to both manufacturer liability and seller liability. Judgment was entered accordingly (001252).

A Motion for Judgment N.O.V. or alternatively for a New Trial, was timely filed and a new trial was granted for reasons which include the following statement, which is key to the application filed herein:[1]

---

[1] Excerpt 17, Record 001779.

> "The weight of the evidence did support the fact that other persons routinely entered the ice machine to assist in ice-making operations; *other evidence placed in dispute the decedent's knowledge of the allegedly obvious danger.* More importantly, the court has viewed a photograph submitted to it during the trial, which plaintiff's counsel failed to include in the pre-trial order and never offered into evidence (Record 248), *which weighs heavily against defendant's contentions regarding the obvious danger posed by the ice machine.*"

Other reasons for granting a new trial[2] included defects in the jury charges ("...the jury however was without a proper explanation as to the duty imposed upon a seller to warn..." at 001778) and, manifest injustice ("...the court is convinced that a manifest injustice has occurred with respect to Industrial's possible liability as a seller of a dangerous product, including, specifically, the issue of this defendant's failure to warn." at 001780).

On April 10, 1992, Industrial filed a motion for Summary Judgment supported by an affidavit which essentially said that Industrial was unaware of any danger posed by the auger prior to Kelley's death. The motion was set for hearing April 29, 1992. On April 22, *one week before the scheduled hearing*[3].The Court granted the motion for sum-

---

[1] For the convenience of the members of the Court, we annex the Minute Entry granting a new trial as Appendix "A".

[3] Rule 56(c) of the Federal Rules of Civil Procedure provides that: "...the adverse party *prior to the day of hearing may serve opposing affidavits.*" Local Rule 2.07, requires the opposition to be filed 8 days prior to the date of rehearing. Because the panel considered the merits, the

mary judgment as "unopposed". Within ten days, a request for reconsideration was filed, together with a response addressing the merits of the motion. On May 25, 1992, the District Court DENIED plaintiff's motion for Reconsideration and an appeal was timely filed. Industrial cross-appealed from the order granting a new trial.

On June 15, 1993, a panel of this Court affirmed the decision of the District Court and we now suggest en banc consideration.

3. Statement of Facts Necessary to Argument of the Issues.

(a) The auger with ice. Notwithstanding the fact that Industrial did not make "obvious danger" an issue of uncontested material fact, as set forth hereinbelow, the panel decided that the danger of entanglement was so "obvious" and that the evidence was so "uncontroverted" that summary judgment was proper on this issue. Before Jack Kelley was even employed by Delton's One Stop, a demonstration of the auger took place. During the demonstration, the auger caught a steel shovel and mangled it. Jack Kelley did not see that demonstration. It is apparent, however, that the "shovel-eating incident" played a leading role in the panel's decision. With all due respect, however, there was a *substantial* difference between the auger's appearance at the "shovel-eating" demonstration

---

(footnote 3 continued)

inconsistencies, between the Federal Rule and the Local Rule were not addressed.

Nevertheless, it appears that the district court's irritation over the non-compliance with Rule 2.07 impacted consideration of the substantive issues.

and the auger's appearance when it was covered with 18 inches of ice.

For this reason, we specifically displayed to the panel, at oral argument, the photograph upon which the District Court relied in granting a new trial. The danger was not obvious:

(b) The Level of the Ice when Kelley was Killed. Consistent with the appearance of the photograph, Steve Fillimich testified that *on the day of the accident,* the ice level was "Low. About 18 inches." (Vol. 8, p. 44) He also testified that the shovelling process was required while the auger was on, otherwise, "you wouldn't accomplish nothing" (p. 45). It is clear that this evidence does indeed "weigh heavily against the defendant's contentions regarding the obvious danger posed by the ice machine," as the District Court observed in granting a new trial.

(c) The Speed of the Auger. The speed with which the auger circled the bin would also mask the hidden danger of the auger. Damas Demere, in describing how the entire ice plant was *not functioning properly,* testified about the speed of the auger, at page 75, line 13:

> "And basically the two screws are unstoppable as far as for rotating, but they would not sweep the room. *Every 20 minutes it's supposed to make a total, 360 degree lap of that room.* When the ice got hard, it simply would not advance, and the gear to do that with, to advance it, was outside the building. And you could put a wrench on it, and you put a little body weight on it, you could make it sweep into the ice. But the machine alone

wasn't capable of doing it."

Thus, the auger was sweeping the bin at a speed *slower* than 20 minutes per each 360 degrees, if at all!! By the mere fact that the auger needed assistance, it is obvious that the auger was either not moving, or moving very slowly, a fact that would dictate against the defendant's claim of open and obvious danger.

(d) The Warning Decals. The manufacturer recognized the need to warn users and provided the following warning stickers which were *not* used by the seller when the ice plant was installed:

It is inherently inconsistent to conclude that there was no duty to warn when the duty was, in fact, undertaken. And although the panel properly recognized additional basis for seller liability, independent of the "duty to warn", the failure to use the warning stickers was simply disposed of by footnote 10:

> "If the manufacturer had furnished warnings, the sellers presumably would have had knowledge of the defect, or, at the very least, *they would have been negligent in not forwarding the warnings to the consumer.*"
>
> Evidence ragarding this issue was adduced at trial:
>
> "Q. And were you aware at that time (the shovel-eating demonstration) of the existence of the type of warning decals that were received in October?

"A. I saw warning decals when I was there."[4]

Additionally, we submitted to the District Court, *before trial*, state-of-the-art literature which required the waring to be placed "next to the access door" of any structure containing an auger.[5] Indeed, it is Louisiana law that the warnings must be placed" in a manner likely to catch the user's attention..." *Easton v. Chevron*, 602 So.2d 1032 (4th Cir. 1992), at 1037.

(e) "Professional Vendor" Status. the panel found that Industrial's liability was limited to a duty to warn, which duty was absolved because the danger was obvious. At footnote 9, the panel recognized that such a rule does not apply to a "professional vendor". This is correct. We respectfully submit that the panel erred, however, in concluding that:

> "...Because Kelley does not seek recovery under either of these two theories[6], we need not concern ourselves with the details."

We *did* rely on the "professional vendor" doctrine. Indeed, Industrial *was* in the "business" of selling ice plants and we often made the point. Testimony was adduced to show that Industrial was a "professional vendor"[7],

---

[4] David McGowan, Excerpt 16, pg. 34.

[5] *Application of Interlocks, Deadman Controls and Emergency Stop Devises As a Design Strategy to Reduce Risk Associated with Agricultural Machinery*, J. B. Sevart, 3/19/82 (000888, Excerpt 2).

[6] (a) Holding oneself out as a manufacturer and (b) professional seller.

[7] *David Easley*, at 346 *et seq; David McGowan*, at 304 *et seq; Lawrence Olinde*, at 265 *et seq.*

and we often emphasized that Industrial's letterhead described the company as:

**"AMMONIA & FREON
REFRIGERATION SPECIALISTS".**

It was specifically with the "professional vendor" issue in mind that we conducted the following cross-examination of David McGowan, Vol. 7, at page 31:

"Q. I asked you whether you were *in the business of selling* refrigeration and ice equipment.

A. *That is correct.*

Q. Refrigeration and ice equipment that is necessary to put into an ice plant?

A. *That's correct.*

In our jury charges, we submitted a specific jury charge on the issue; in our motion for judgment n.o.v., we again specifically relied on liability vested upon "professional vendors" (Excerpt 15, 001155); in our original brief to the panel, we made specific reference, at page 8, to the fact that Industrial held itself out to be "Refrigeration Specialists", detailing at footnotes 4 through 11, the testimony of various witnesses regarding the "sales pitch" made to the unsophisticated Demere family; in our reply brief to the panel, at page 1, we specifically challenged Industrial's statement that they were not a "professional vendor".

Obviously, *we did rely upon a theory of liability on the*

part of Industrial as a "professional vendor" and the panel's conclusion to the contrary is clearly erroneous. It is respectfully submitted that the factual issues regarding Industrial's status as a "professional vendor" precluded summary judgment, as did questions of fact regarding "obvious" danger.

4. Argument on Issues Raised for En banc Consideration.

(a) Uniformity of Decisions. Rule 35(a) of the Federal Rules of Appellate Procedure provides for en banc consideration in order to "...Secure or maintain uniformity..." of decisions. In this products' liability case, the panel has affirmed a summary judgment on the issue of "open and obvious" danger, notwithstanding established precedent against deciding such fact issues by summary judgment. We respectfully believe that the panel decision is inconsistent with previous rulings by this Court in *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167 (5th Cir. 1990) and *Little v. Liquid Air*, 952 F.2d 841 (5th Cir. 1992), *en banc rehearing pending.* In *Lavespere, supra*, the panel deciding that case made it clear that summary judgments are rarely appropriate in this type of case, stating at 178:

> "...this court has consistently declared that 'the use of summary judgment is rarely appropriate in negligence or products liability cases, *even where the material facts are not disputed.*' "

In *Little v Liquid Air, supra;* which is pending before an en banc panel, this Court held at 847:

> "An inherently normative issue, such as whether

> a manufacturer has adequately warned a user that its product is hazardous, is not generally susceptible to summary judgment."

And while we recognize that our case involves seller liability, we believe the consistent teaching of the Fifth Circuit has been *against* the granting of summary judgments in products liability cases, particularly on issues of fact such as those set forth hereinabove. The panel's reliance on *Melton v. Deere,* 887 F.2d 1241 (5th Cir. 1989) is particularly misplaced because there, the vertical unloader *did* have a warning sticker next to the access door. At 1242, the decision begins by noting:

> "At times the grain tank and unloading system must be cleaned out. For this purpose, a five-by-five-inch opening is located at the bottom of the vertical unloader, covered by a door. Immediately above the door is affixed a decal:
>
> ! WARNING
> To avoid bodily injury from turning auger, stop engine and remove start key before opening clean out door.
>
> Another warning decal, located over a toolbox about two feet from the cleanout door, included the following instruction:
> 2. Disengage and shut off all engine and/or motor power before servicing or unclogging machine."

If the warning stickers which are shown at page 8 of this application had been utilized, then the decision of the panel would have been consistent with *Melston, supra,* and

the cases it relied upon. But the warning stickers were not used!!

(b) Failure at the Threshold. It is also the uniform rule of the Fifth Circuit and of the United States Supreme Court that the mover for summary judgment has the threshold burden of establishing those facts as to which there is no issue. Because Industrial did *not* certify the issue of "open and obvious" danger in its Rule 2.09 Statement of Uncontested Facts, it did not bear its threshold burden as required by *Celotex v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) and its considerable progeny. To the best of our knowledge, no Fifth Circuit decision has ever allowed a fact issue *not set forth in the Rule 2.09 Certificate* to be "supplied" by the Court. Uniformity requires that a non-mover to a summary judgment be put on *clear notice* as to what fact issues are "uncontested".

(c) Questions of Exceptional Importance. We do not know what issues the en banc panel is presently considering in *Little v. Liquid Air, supra.* Based on our monitoring of the case and our conversations with counsel involved, we believe that the en banc panel is presently considering in *Little v. Liquid Air, supra.* Based on our monitoring of the case and our conversations with counsel involved, we believe that the en banc panel is concerned with (a) the application of the facts in that case to a summary judgment, (b) the "sophisticated user" rule and/or (c) the applicability of the "risk/utility" doctrine, recently made the subject of two Mississippi Supreme Court decisions, *Swan v. I.P., Inc.,* Cause No. 89-CA-1255) and *Sperry-New Holland, Division of Sperry Corp. v. Prestage,* (Case No. 90-CA-0657).

We submit that this case presents similar issues which the en banc panel has found important in *Little v. Liquid Air.* The Demeres were extremely unsophisticated and, on remand, the "sophisticated user" doctrine would have to be dealt with in accordance with this Court's ruling in *Davis v. Avondale Industries, supra.* This "risk/utility" doctrine was not at all developed. The recent national trend toward the application of the "risk/utility" doctrine requires that the issues in this case be weighed risk-against-utility.[8]

(d) The Lethality of Screw-type Augers. The lethality of screw-type augers is a matter of *national concern.* We believed that the "Jet Wheel" doctrine applied and so moved, *in limine.* The District Court granted our motion but did not actually exclude evidence of "victim fault". The panel did not deal with the issue because it affirmed summary judgment. We believe that the application of the "Jet Wheel" doctrine to machinery as lethal as the auger involved herein is a matter of exceptional *societal* importance. In his 1982 presentation to the American Society of Agricultural Enginers, Mr. J.B. Sevart, P.E. quoting from the National Safety Council, noted that agriculture[9] was "*...the most dangerous occupation in the United States...*" (Excerpt 2, 000860), and *criticized* the industry argument that safety would be best insured by (a) providing warnings and (b) instructing operators to turn the machine OFF

---

[8] The reason workers had to enter the bin was because the entire system did not work properly. Thus, the "utility" was minimal as opposed to the grave risk involved.

[9] The orbital bin at issue was typically used to convey grain, but had been adapted to convey ice by Rochester Silo.

when leaving the operator position (000861). In criticizing this utopian concept, Mr. Sevart's research paper noted that the strategy had failed miserably "...to reduce the number and severity of the injuries associated with agricultural equipment..." (000862). Regarding the foreseeability of what happened to Jack Kelley, Mr. Sevart wrote, as follows:

> "No human operator can be expected to be one hundred percent perfect. Who hasn't run a stop sign or a red light even though he had traveled the route many times and in fact, the number of times the route had been traveled may be a dominant factor in the incident. *It is most foreseeable that boredom, fatigue, worry, inexperience,*[10] *and a host of other factors deny the existence of the perfect operator.*"

In the remainder of his paper, Mr. Sevart suggested the use of interlocks, dead-man controls, and emergency stops, all of which were available when *this* ice plant was assembled in Lafourche Parish in 1987. Detailed references to national publications were included in our original brief to the panel, pp 21 - 26. For the convenience of the members of the Court, we annex as Appendix "B" and Appendix "C" literature which we submitted to the District Court in connection with our "Jet Wheel" motion.

---

[10] In the case at bar, Jack Kelley was inexperienced with the perils of the auger:

(a) He wasn't there when the auger ate the shovel;

(b) when he worked inside the bin, the ice masked the danger (Excerpt 14). *See also,* Plaintiff's Exhibit "J" and

(c) when he was killed, it was, *at best*, Jack Kelley's second time inside the bin.

5. Conclusion. the issue of "open and obvious danger" was never properly presented. The District Court, we respectfully submit, was more involved with chastising Plaintiff's counsel because a deadline was missed then with the substantive rights of this widow and mother. The panel gravely erred in affirming summary judgment under these complex set of facts. We respectfully request en banc reconsideration.

Respectfully submitted:

/s/ Henry L. Klein
HENRY L. KLEIN, ESQ.
Bar No. 7440
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record by hand delivery, FAX and/or by depositing same into the United States Mail, properly addressed and postage prepaid on this 14th day of July, 1993.

Henry L. Klein